TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 481

ROCKWELL KENT AND WALTER BRIEHL,
PETITIONERS,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1957
CERTIORARI GRANTED NOVEMBER 25, 1957

INDEX

	Page
Complaint	2
Answer	4
Motion for Preliminary Injunction	7
Plaintiff's Motion for Summary Judgment	7
Affidavit of Rockwell Kent	7
Exhibit 4 to Kent Affidavit	17
Exhibit 5 to Kent Affidavit	18
Exhibit 6 to Kent Affidavit	21
Exhibit 12 to Kent Affidavit	22
Exhibit 13 to Kent Affidavit	28
Exhibit 14 to Kent Affidavit	30
Exhibit 17 to Kent Affidavit	31
Exhibit 20 to Kent Affidavit	32
Exhibit 23 to Kent Affidavit	33
Exhibit 24 to Kent Affidavit (Transcript of Hearing)	34
Exhibit 10 in Passport Hearing (Record of Hearing Before Senate Investigations Subcommittee)	64
Exhibit 30 to Kent Affidavit	72
Exhibit 31 to Kent Affidavit	74
Exhibit 32 to Kent Affidavit	75
Exhibit 33 to Kent Affidavit	75
Defendant's Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment	76
Affidavit of Frances G. Knight	76
Opinion of the Court	84
Order	85
Notice of Appeal	85

Proceedings in U.S.C.A. for the District of Columbia Circuit 87
Opinion, Prettyman, J. 87
Judgment 91
Clerk's certificate (omitted in printing) 95
Joint Appendix filed in the U.S.C.A. for the District of Columbia Circuit, Walter Briehl v. John Foster Dulles (see separate index) 97

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,297

ROCKWELL KENT, *Appellant*

v.

JOHN FOSTER DULLES, Secretary of State, *Appellee*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

Filed Dec. 14, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5441-55

ROCKWELL KENT, Ausable Forks, New York, *Plaintiff*

v.

JOHN FOSTER DULLES, Secretary of State, Department of State, Washington, D. C., *Defendant*

Complaint for Declaratory Judgment and Injunction

The plaintiff, Rockwell Kent, by his attorneys, complaining of the defendant, John Foster Dulles, Secretary of State, alleges as follows:

1. The Court has jurisdiction of this action under D. C. Code Sections 11-305 and 11-306; under Section 10 of the Administrative Procedure Act, Title 5 U. S. Code section 1009; and under Title 28 U. S. Code, section 2201.

2. The defendant, John Foster Dulles, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

3. The plaintiff is a citizen of the United States, residing in Ausable Forks, New York. He is an internationally known artist.

4. On August 2, 1955, plaintiff applied for a passport to travel to Europe to paint pictures.

5. On November 8, 1955, plaintiff appeared at the Passport Office for a hearing upon his application for a passport. He demanded that he receive a passport or that he be confronted with the evidence upon which the defendant would base his denial of a passport. The defendant refused to comply with this request, maintaining that the sole purpose of the hearing was to give officials of the State Department an opportunity to

question the plaintiff concerning his lawful political beliefs and associations. The plaintiff, nevertheless, insisted upon his right to a passport or to be confronted with the evidence against him and refused to submit himself to such an inquisition.

6. Thereafter on November 25, 1955, the Director of the Passport Office informed the plaintiff that she would take no action on his application for renewal because of the plaintiff's refusal to submit himself to an inquisition into his political beliefs and associations in the absence of being confronted with the evidence, if any, upon which the State Department relied.

7. The action of the defendant in this case is unlawful in that:

a. Plaintiff as an American citizen has a right under the First, Fifth, Ninth and Tenth Amendments to travel outside of the United States.

b. The statutes authorizing the Secretary of State to issue passports do not authorize him to impose political conditions upon the issuance of passports. The regulations issued by the Secretary of State are not authorized by statute and are on their face arbitrary and illegal in that they impose political conditions upon travel in violation of applicable statutes and the First and Fifth Amendments of the Constitution.

c. Due process of law requires that before an individual be denied the right of travel he must be accorded a hearing at which he will have the opportunity to be confronted with the evidence against him.

d. There is no authority in the statute authorizing the issuance of passports for the imposition of a test oath as a condition precedent to consideration of an application for a passport; and the imposition of such a condition is in violation of the First and Fifth Amendments.

8. The plaintiff has exhausted his administrative remedies.

9. The actions of the defendant in denying the plaintiff a passport have interfered with plaintiff's rights of travel, free speech, association and livelihood and are causing the plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment

a. Decreeing that the plaintiff, as an American citizen, is entitled to a passport under the statutes of the United States, including the Passport Act of 1926.

b. Decreeing that the passport regulations of the Secretary of State are invalid and illegal and are in violation of the statutes of the United States, including the Passport Act of 1926, the Constitution of the United States and the Universal Declaration of Human Rights of the United Nations.

c. Decreeing that the defendant's refusal to issue a passport to plaintiff is in violation of the plaintiff's rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations.

d. Enjoining the defendant from continuing to deny a passport to the plaintiff.

e. Directing the defendant to issue a passport to plaintiff.

f. And for such other and further relief as may be just and proper.

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58 Filed Feb. 13, 1956

Answer

Now comes the defendant, John Foster Dulles, Secretary of State of the United States, and in answer to plaintiff's complaint for declaratory judgment and injunction says the following:

FIRST DEFENSE

1. Defendant asserts that inasmuch as the allegations contained in paragraph 1 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant denies the allegations contained in paragraph 2 of the complaint except that defendant admits that he is Secretary of State of the United States and that as Secretary he alone is authorized to grant or issue, or refuse to grant or issue, passports under such rules as the President designates.

3. Defendant admits that plaintiff is a citizen of the United States, residing in Ausable Forks, New York. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Answering the allegations contained in paragraph 4 of the complaint, defendant admits that on August 2, 1955, plaintiff applied for a passport for travel to various
59 western European nations and Czechoslovakia for the stated purpose of pursuing his profession and for pleasure.

5. Defendant denies the allegations contained in paragraph 5 of the complaint, except that defendant admits that on November 8, 1955, plaintiff and his attorney attended an informal hearing in the Passport Office on his application for a passport.

6. Defendant denies the allegations contained in paragraph 6 of the complaint except that defendant admits that by letter dated November 25, 1955, plaintiff was advised that in view of his refusal to furnish a sworn statement with respect to his present or past membership in the Communist Party the Department of State would give further consideration to his passport application at such

times as he was willing to comply with the Passport Regulations.

7. Defendant asserts that inasmuch as the allegations contained in paragraph 7 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the allegations contained therein.

8. Defendant denies the allegations contained in paragraph 8 of the complaint.

9. Defendant asserts that inasmuch as the allegations contained in paragraph 9 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the allegations contained therein.

SECOND DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

The court lacks jurisdiction over the subject matter of the complaint.

FOURTH DEFENSE

Plaintiff has failed to comply with the Passport Regulations and consequently is ineligible for a passport.

60 FIFTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

WHEREFORE, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

7 Filed Feb. 7, 1956

Motion for Preliminary Injunction

Plaintiff, by his attorneys, moves the Court for a preliminary injunction enjoining, pending the disposition of this action, the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with him from denying a passport to plaintiff, and directing the defendant to issue a passport to the plaintiff for use during the pendency of this action.

The grounds of this motion are that unless so enjoined the defendant's action will cause the plaintiff irreparable injury before this cause can be disposed of.

In support of this motion plaintiff refers to the pleadings herein and to the affidavits filed by the plaintiff.

---

6 Filed Feb. 7, 1956

Plaintiff's Motion for Summary Judgment

Now comes the plaintiff by his attorneys and, pursuant to rule 56 of the Federal Rules of Civil Procedure moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion plaintiff refers to the entire record herein, including the pleadings and the affidavit of the plaintiff.

---

8 Filed Feb. 7, 1956

Affidavit of Rockwell Kent

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROCKWELL KENT, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action, which I instituted for the purpose of compelling the defendant

to issue me a passport. I make this affidavit in support of my motion for summary judgment in said action.

2. I have read the complaint filed in this action and know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.

3. I am an artist. My work which began receiving important recognition nearly fifty years ago, has included activities as painter, illustrator, wood engraver, author, lithographer, and lecturer. I am represented in many of the leading museums and private collections in this country and my work has received many awards in the Americas and in Europe. I have served on many exhibition juries, was for a number of years a member of the juries of the Guggenheim Foundation and was a member of the Guilds' Committee for Federal Writers' Publications, Inc. In 1954 one of my lithographs, "Europe", was in the graphic arts exhibition of the American Office of Information, in Paris. Among the books which I have illustrated are "Moby Dick", "Shakespeare", "Candide", "Canterbury Tales", "Leaves of Grass", "Decameron", "Paul Bunyan", and "Faust". I am the author of the following published volumes: N by E (The story of a journey by sailboat to Greenland and of shipwreck there); Rockwell Kent Iana, Few Words and Many Pictures (Essays on art and reproductions of paintings, lithographs and wood engravings); Salamina (A story of my life in Greenland); This Is My Own (A story of the purchase and development of an Adirondack farm and the distracting obligations of citizenship); and It's Me O Lord (an autobiography).

4. I have been effectively debarred by the State Department from foreign travel since the Spring or Summer of 1950. My last passport, which was issued in February 1950, was in fact, not a full passport, but was limited to a period of only a few months, expiring May 26, 1950. Under date of July 19, 1950, I wrote to the State Depart-

ment, asking for a renewal of this passport for a period of two months in order to leave for Europe on August 9, 1950 to attend the meetings of an international jury at Prague to select the winners of prizes offered in the arts of painting, literature, and the cinema; a copy of that letter is annexed hereto and incorporated herein, as Exhibit "1". Ten days later, on July 29, 1950, I wrote requesting the Department to expedite the matter, and I stated that since my previous letter (July 19, 1950) I had been invited also to attend the meeting of World Peace Congress; a copy of that letter is annexed hereto and incorporated herein as Exhibit "2".

5. I followed up this request by telephone on August 3, 1950 to the Passport Office, and a letter dated August 4, 1950, a copy of which letter is annexed hereto and incorporated herein as Exhibit "3".

6. On August 4, 1950, after my last letter had been posted, I received a letter from Mrs. R. B. Shipley, dated August 1, 1950, a copy of which is annexed hereto and incorporated herein as Exhibit "4". She stated that my passport of earlier that year had been used for travel in countries other than those for which the Department had validated it, and she requested an affidavit setting forth the details of my travel earlier in 1950, and the reason why I used the passport to go to countries for which it was not validated.

7. Immediately upon receiving the last mentioned letter I wrote Mrs. Shipley the second letter dated August 4 and annexed hereto as Exhibit "5" which fully answered her questions. I annexed an affidavit incorporating the contents of the letter.

8. On August 25, 1950, I received a letter dated August 11, 1950 from Mr. Willis H. Young, Acting Chief, Passport Division, in reply to my letter of August 4, 1950. Without commenting upon or relying to the full explana-

tion contained in my letter of August 4, 1950, Mr. Young merely noted that I was asserted to have used my passport for travel to countries for which it was not valid, that a federal statute provided for withdrawal of the protection of the United States from persons who so used a passport while they continued to reside abroad and for prosecution of such persons, and concluded: "In view of the foregoing your passport cannot be further validated." This letter is annexed hereto and incorporated herein, as Exhibit "6". I let the matter rest at that point, the occasion for my European trip that summer having lapsed owing to the time consumed in my fruitless passport application effort.

11 9. A few months later, on February 27, 1951 I again wrote to Mrs. Shipley:

"I want to go somewhere to paint pictures. I have two places in mind. One is Ireland where, on the coast of Donegal, I once spent some months, and the other is Peru, where I have always wanted to paint the mountains and ruins of the Inca civilization. I want to go there to paint pictures and for nothing else. Would a passport be issued to me for that purpose?"

A copy of this letter is annexed hereto and incorporated herein as Exhibit "7".

10. Two weeks having gone by with no word from Mrs. Shipley, I wrote to her again, on March 13, 1951, stating that

"Since writing I have eliminated Peru, for I have a patron who is particularly interested in pictures of Ireland, and who has practically assured purchases of pictures, as an important consideration in the determination of my plans."

I added:

"I repeat the statement of my recent letter that my sole purpose in going to Ireland is to paint."

A copy of this letter is annexed hereto and incorporated herein as Exhibit "8".

11. Mrs. Shipley's reply of March 21, 1951 stated:

". . . the Department is not willing at this time to grant you passport facilities for travel to any countries for any purpose."

A copy of this letter is annexed hereto and incorporated herein as Exhibit "9".

12. In 1955 I again attempted to obtain a passport. Under date of May 28, 1955, I wrote to the State Department applying for a passport to attend a meeting of the World Council of Peace, in Helsinki, Finland, to which I had been invited; a copy of that letter is annexed hereto and incorporated herein as Exhibit "10". Since that meeting was scheduled for June 22, 1955, I requested the Department to take note of the need for an expeditious decision.

12 13. On June 15, 1955 I wrote to the Department again about this because it had not replied to my application. A copy of this letter is annexed hereto and incorporated herein as Exhibit "11".

14. The Helsinki meeting was held and concluded before the State Department advised me by letter of June 29, 1955 that it was obliged to disapprove my request "tentatively" under Section 51.135 of Title 22 of the Code of Federal Regulations. The Department stated that I could have an informal hearing before the Passport Office, at which I could present my case and all relevant information, but that if I desired such a hearing I would be required to submit a sworn statement as to whether I was at that time or had ever been a Communist. If I did not desire a hearing, the Department stated, it would consider any written statement under oath that I might submit, provided that I included therein a statement as to Communist Party mem-

bership. A copy of this letter is annexed hereto and incorporated herein as Exhibit "12".

15. The purpose of my trip to attend the Helsinki conference having been frustrated by the State Department's delay, I replied to the last mentioned letter, stating my protest against the Department's action in my case and its policies in similar ones; a copy of this letter is annexed hereto as Exhibit "13".

16. In the meantime, however, I had written to President Eisenhower on June 24, 1955, after I saw that the Department had no intention of deciding the matter in time for me to go to Helsinki. This letter was one of protest against the Department's treatment of me and an affirmation of my belief that my purpose in going abroad was to serve the same high purposes of peace to which he had given utterance; a copy of it is annexed hereto as Exhibit "13a".

It was referred to the Passport Office, whose Direc-
13 tor; Miss Frances G. Knight wrote me further about the matter on July 19, 1955, reiterating essentially the same positions which the Department had taken in its previous letter of June 29, 1955; a copy of Miss Knight's letter of July 19, 1955 is annexed hereto as Exhibit "14".

On August 2, 1955, I filed a new passport application stating as the purpose of my trip, "prosecution of profession and pleasure." I applied for a passport to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia.

18. I did not receive a decision on my application of August 2, 1955 until November 25, 1955. Between the date of my application and the Department's answer, my attorney, Mr. Leonard B. Boudin, was obliged to write to the Department at least seven times and to make numerous telephone calls in an endeavor to expedite its action.

19. On September 2, 1955 Mr. Boudin wrote the Passport Office requesting a final decision in the light of five

years of correspondence, unless the Department decided that an informal hearing was a condition precedent to a decision. A copy of this letter is annexed hereto as Exhibit "15".

20. No reply having been received, Mr. Boudin again wrote the Passport Office on September 12, 1955, a copy of which letter is annexed hereto as Exhibit "16".

21. Miss Knight replied on September 14, 1955 to Mr. Boudin's letter of September 2, 1955, stating that "a report of evaluation is expected to be forthcoming in the near future"; a copy of her letter is annexed hereto as Exhibit "17".

22. On September 20 and 28, Mr. Boudin wrote Miss Knight the letters annexed hereto as Exhibits "18" and "19" requesting a passport or a hearing, and point out the necessity for an early decision.

23. Miss Knight replied by a letter dated September 29th, to Mr. Boudin's letter of September 20th, a copy of which is annexed hereto as Exhibit "20". This letter stated that the Passport Office was awaiting a report "by another office of the Department", but that "in the meantime" I could have "an informal hearing".

24. On October 26, 1955 Mr. Boudin telegraphed Mr. Scott McLeod, the Director of the Division of Consular Affairs, requesting a telephone call from the person in charge of my case; a copy of the telegram is annexed hereto as Exhibit "21". Not having received a response to the telegram Mr. Boudin followed this by a letter the same day to Mr. McLeod, requesting a final decision; a copy of that letter is annexed hereto as Exhibit "22".

25. On October 27, 1955 Mr. Boudin had a telephone call from Mr. Orson Trueworthy, Mr. McLeod's Special Assistant, as appears from Mr. Boudin's letter of the same day to Mr. McLeod, a copy of which is annexed hereto as Exhibit "23". Mr. Trueworthy and Mr. Boudin discussed the

futility of an informal hearing which would not lead to a decision because the passport applicant contested the validity of the Department's demand for an affidavit. I am advised also that in discussions between my Washington counsel, Mr. David Rein and Mr. Ashley J. Nicholas, Assistant Director of the Passport Office, there had been a similar discussion as to the futility of a hearing, since the Department would not render a final decision where an affidavit was refused it.

26. Nevertheless Mr. Rein was advised by the Passport Office on or about November 2, 1955 that an informal hearing would be held on November 8, 1955. I attended the hearing on that day with Mr. Rein; a copy of the transcript of the "hearing" is annexed hereto as Exhibit "24". It will be noted that no witnesses were produced by the Department to support any allegations against me. The Department's principal items of documentary evidence were my recent book "It's Me O Lord", and the transcript of a hearing before the Senate Permanent Sub-Committee on Investigations. I stated, under oath, that everything in the book was true and the Department did not make any assertion to the contrary. I was asked to execute an affidavit under Section 51.142 of the Regulations and declined to do so because I regarded the demand for a test oath as illegal and in violation of my principles.

27. The record of this "informal hearing" of course speaks for itself. I think it appropriate, nevertheless, to indicate the following to the Court:

(a) I expressly denied the allegation that I had said that "the American Government is not my Government" which the Department repeated in the letter of June 29, 1955 (Exhibit 12) in complete disregard of my explicit disclaimer by letters in 1950 to the New York Times and Mrs. Shipley;

(b) It was my understanding in 1950, as it is today, that while the inability to use a passport for travel to a particular country might affect one's right to American pro-

tection in that area, it did not make travel there illegal. I am advised by counsel that the State Department has made public announcements to this effect and that many persons, including at least one United States Senator, has traveled to a country specifically excluded from his passport coverage.

16 (c) The congressional committee hearing referred to—as the Court will see from an examination of it,—contains no evidence that I have done anything wrong or indeed anything relevant, in my opinion, to the right to travel, and in addition could not be competent evidence of anything in a passport hearing.

(d) I respectfully request the Court to perceive from the record—including, as it does, excerpts from an exceptionally long and complete autobiography—that I have made the facts of my beliefs and actions public and that my refusal to discuss these matters with the Passport Office was due entirely to my conviction that a man's political beliefs and activities are irrelevant to the issuance of a passport to an American citizen.

28. A week later, on November 15, 1955, Mr. Boudin wrote Miss Knight a letter, a copy of which is annexed hereto as Exhibit "25", requesting an immediate decision in my case. On November 18, he reiterated this request orally in a meeting with Mr. Nicholas and Mr. Robert Johnson, another official of the Passport Office. This appears from Mr. Boudin's letter of November 21, 1955 to Miss Knight, a copy of which is annexed hereto as Exhibit "26", in which he requested her decision upon my application. It appears too from the correspondence that Mr. Boudin discussed this matter with Mr. Cartwright of the Legal Advisor Office of the Department of State and was assured that a decision had been drafted. Miss Knight wrote Mr. Boudin on November 22, 1955 the letter annexed hereto as Exhibit "27" to the effect that she would notify us of her decision as soon as she could. Mr. Boudin again wrote Miss Knight,
17 this time on November 25, 1955, by letter annexed

hereto as Exhibit "28" requesting that the drafted letter be transmitted to him.

29. On November 28, 1955, no decision having been received from Miss Knight, Mr. Boudin wrote her again requesting such a decision; a copy of his letter is annexed hereto as Exhibit "29". Shortly thereafter, Miss Knight's letter of November 25, 1955, copy of which is annexed hereto as Exhibit "30" was received by me. This letter noted that an informal hearing had been held in which I had failed to execute a non-Communist affidavit, or to refute or explain allegations against me.

30. On November 30, 1955 Mr. Boudin wrote to Mr. John W. Sipes, counsel to the Board of Passport Appeals, indicating (a) my desire to appeal to the Board of Passport Appeals and (b) my understanding that under the Department's passport rules and the procedures an appeal would not lie because of my refusal to take the test oath imposed upon me by Miss Knight and her failure to describe her decision as "final"; a copy of the said letter is annexed hereto as Exhibit "31".

31. No answer having been received, Mr. Boudin wrote directly to the defendant herein, the letter dated December 5, 1955, annexed hereto as Exhibit "32" requesting a response to his letter. On December 7th, Mr. Boudin wrote the Chairman of the Board of Appeals the letter annexed hereto as Exhibit "33", calling attention to the Department's failure to respond to his inquiries. To this day, neither the Secretary, nor Mr. Sipes, nor the Chairman of the Board of Passport Appeals, nor anyone else in the Department, has responded to these communications.

32. I desire to travel to Europe for the purpose indicated in my last and still pending application for a passport, namely, the practice of my profession as an artist, and the pleasure of traveling. Painting is not only a means of self-expression, it is the way in which I have earned a livelihood for nearly half a century. A passport is therefore an artistic and an economic necessity.

33. Upon the foregoing, I respectfully ask that this Court enter a summary judgment in my favor for the relief prayed for in the complaint including a direction that the defendant issue me a passport of standard form and duration.

/s/ ROCKWELL KENT

Exhibit "4"

22

DEPARTMENT OF STATE
WASHINGTON, D. C.

August 1, 1950

In reply refer to:
130 - Kent, Rockwell

Mr. Rockwell Kent,
Ausable Forks, New York.

My dear Mr. Kent:

The Department has received your letter of July 21, 1950 with reference to your application for the renewal of your passport.

It appears that your passport was last validated on February 27, 1950, valid until May 26, 1950 for travel in the British Isles, France, Sweden, Norway and Denmark only. However, upon examination of the passport, it appears that during the above mentioned period the passport was used for travel in other countries. Before giving further consideration to the matter of granting you passport facilities for your proposed trip, the Department desires to be furnished with an affidavit setting forth the details of your travel on the aforementioned trip and the reason why you used the passport in violation of the restrictions contained therein.

Sincerely yours,

R. B. Shipley,
Chief, Passport Division.

Exhibit "5"

23 August 4, 1950

Your Ref:
130 - Kent, Rockwell

Mrs. Ruth Shipley
Department of State
Passport Division
Washington, D. C.

Dear Mrs. Shipley:

I had just posted a letter addressed to you when I received your letter of August 1st., post-marked Washington, August 2nd., 9:00 P.M. I hasten to reply by the same mail. I am glad to explain the circumstances of my having visited countries which I had not listed in my application for passport, and which were consequently not listed in the passport, and to detail the reasons for that trip.

I was invited by the World Peace Congress to be one of an international delegation to meet Monsieur Herriot, President of the French Chamber of Deputies, and appeal to him to place before the Chamber of Deputies for their consideration the proposal that France, in concert with other nations, act to outlaw atomic weapons and move immediately toward the reduction of all armaments. I was glad to serve in such a cause. On the very day of my arrival in Paris I did accompany the delegation to its interview with Mr. Herriot. On the following day, I believe, I was one of six speakers to address a large group of the French Deputies and appeal to them directly for action toward the reduction of armaments and the establishment of world peace.

It had been suggested that I attend the Stockholm Conference of the World Peace Congress, but that suggestion was not made a request until a week later.

While in Paris, I was asked by the Committee of the World Peace Congress if I would accompany an internation-

al delegation to Moscow, where it had been arranged they should appear before the Supreme Soviets to ask if that body would join with other nations in the outlawing of atomic weapons and in the reduction of armaments in general. They had counted upon certain other Americans becoming members of that delegation, but in that hope they were disappointed and I was asked if I would go as a substitute. Again, I was glad to go in such a cause. I was accompanied on the trip by the American news reporter, Johannes Steel; and we were joined in Moscow by Mr. O. John Rogge.

En route to Moscow, it was necessary that we stop overnight in Prague.

While in Moscow I spoke impromptu for about five minutes at a banquet of the leading Soviet intellectuals and clergy; and I also spoke at a press conference in reply to questions on the peace movement. The rest of my six days in Moscow were spent in sightseeing or, in the evenings, at places of entertainment or purely social events. It was in Moscow that I was asked to proceed with others to the Stockholm Conference of the World Peace Congress.

After leaving Moscow, I spent a few hours between trains at Leningrad, stayed overnight at Helsinki and proceeded from there to Stockholm.

24 In Stockholm I attended all the sessions of the peace Congress and spoke but once, and briefly. I spoke to endorse the proposal of a British delegate and MP to appeal again to our State Department for the admission of a peace delegation urging that, in respect to our regulations against the entry of Communist, that Committee be composed entirely of non-Communists.

On my way from Stockholm to Paris I stopped overnight in Copenhagen, where I have many friends, and where I addressed a meeting.

From Copenhagen I went to Goteborg, spoke at a large meeting there and returned the same night by sleeper to Copenhagen, leaving Copenhagen an hour or so later for Paris, just in time to avoid the expiration of my wife's return ticket.

I believe that in going to Moscow I was violating no regulation, for neither Russia nor the countries which I passed were listed, as was Yugoslavia, as not to be visited.

The unexpectedness of my trip to Moscow is evidenced by the fact that my round-trip transportation was valid for only two weeks and that, in consequence, I had to have it extended to make the trip. Because my trip abroad was extended my wife, who had not expected to come, joined me in Stockholm. At any rate, if I was guilty of violating a regulation, I can assure you that it was quite unintentional on my part. That I had been to Moscow I did not leave to be discovered on my passport, for my letter to you last May from Stockholm was written to correct a misrepresentation by the press of a statement I had made in Moscow.

As I have written in my earlier letter of today, the deadline on my reservation is Monday noon. I would appreciate being informed by telephone, at my expense, of your decision in the matter of my passport. And if my reply to your questions is deemed satisfactory and the extension is granted I would appreciate my passport and my wife's being mailed by air mail not later than Monday afternoon.

I regret any inconvenience to you this most urgent request on my part may entail.

Sincerely yours,

ROCKWELL KENT

RK/s
uopwa

AFFIDAVIT

I hereby depose that the statements in the above letter are true.

Signed /s/ ROCKWELL KENT

Signed and sworn to before me this 4th day of August, 1950.

Notary Public.....

Exhibit "6"

25 DEPARTMENT OF STATE
WASHINGTON

August 11, 1950

In reply refer to:
130 - Kent, Rockwell

Mr. Rockwell Kent,
Ausable Forks,
New York, New York.

Dear Mr. Kent:

Reference is made to your letter of August 4, 1950 regarding your use of your passport for travel to countries for which it was not valid and to your telephone conversation with the Chief of the Passport Division.

Your passport on Page 13 bears a validation in which it is specifically stated that the passport was not valid for travel in any country except the British Isles, France, Sweden, Norway and Denmark and necessary countries enroute. On the back cover of your passport is printed under the heading "CAUTION" a paragraph as follows:

> "A person to whom a passport has been issued, who uses or attempts to use it in violation of the conditions or restrictions contained therein, may have the protection of the United States withdrawn from him while he continues to reside abroad and may be liable for

prosecution under the provisions of Section 221 of Title 22, United States Code."

Section 221 of Title 22 of United States Code which is referred to above is now included in Section 1544 of Title 18 of the United States Code.

In veiw of the foregoing your passport cannot be further validated.

Sincerely yours

/s/ WILLIS H. YOUNG,
Willis H. Young
Acting Chief, Passport Division.

Exhibit "12"

31 DEPARTMENT OF STATE
WASHINGTON

In reply refer to:
F130 - Kent, Rockwell

June 29. 1955

Mr. Rockwell Kent,
Ausable Forks,
New York.

Dear Mr. Kent:

The Department refers to the application for a passport which you executed on June 1, 1955.

I regret to inform you that after careful consideration of your application for passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Depar ment to in-

form the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist.

The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time.

It has been alleged that you have been affiliated with numerous Communist front organizations, evidence of such affiliations has been corroborated by periodicals, publications issued by the organizations, and witnesses. Your interest in and espousal of the Communist cause dates from at least 1936 when you wrote an article for the "New Masses" which concluded with the statement "to be a true American a man must have the will to right our social wrongs. How is his concern. For me the way is Communism." Your interest in Communism and your sympathetic support for the Soviet have been expressed in your prolific writings published both in the Communist and non-Communist press and your speech making and public appearances sponsored by such Communist front organizations as the American Youth for Democracy; the International Workers Order; the National Council of American-Soviet-Friendship; the American Council for the Protection of the Foreign Born; the Trenton Emergency Civil Rights Conference and the Civil Rights Congress; your willingness to lend your name as sponsor to Communist fronts such as the Abraham Lincoln Brigade; the American Peoples Meeting; the Peoples Radio Foundation; the National Federation for Constitutional Liberties; the Committee for Free Political Advocacy; the World Peace Congress; the National Council of the Arts, Sciences

32

and Professions; the American Peace Crusade; and the diverse official positions held by you in these organizations. You allegedly served terms as President of the United American Artists and the International Workers Order; as Board Member of the Peoples Radio Foundation; and as Chairman of the National Committee for the Defense of Political Prisoners.

You were alleged to have been a long time subscriber to the "Daily Worker", "The Worker", and the "U.S.S.R. Information Bulletin"; and you repeatedly include nationally known Communists among your friends and house guests.

It has been further alleged that in 1950 you used your passport in violation of the restrictions contained therein and travelled to Czechoslovakia, Russia and Finland. The passport was valid only for travel to the British Isles, France, Sweden, Norway and Denmark. While in Russia your activities were described as detrimental to the interests of the United States. According to Moscow reports while you were within the walls of the Kremlin as one of a delegation of American fellow travelers attending a meeting of the Communist sponsored World Committee of Peace Partisans, your contribution to world peace was an attack upon your Government. You reportedly made such statements as "The American Government is not my Government" and, "I am interested in the peace movement because it is backed by Communists. Anything that the Communists say about peace sounds good to me." You were also alleged to have laid a wreath at the grave of John Reed, a founder of the Communist Party in this country, during your unlawful sojourn in Russia.

It has been alleged that you were a speaker at a dinner in 1954 in honor of Eslanda and Paul Robeson held by the New World Review which has been cited as a Communist front; that you were a sponsor of a four page petition addressed to Attorney General Herbert M. Brownell

criticizing the use of paid informers. This petition was allegedly described by an officer of the Communist Party to be regarded as Communist Party activity. It has been alleged that you appeared often at special committee meeting of the Communist Party in Chicago and that you were closely associated with officers of the Civil Rights Congress. You allegedly made a speech in 1952 in which you urged that Communists in the United States must be defended. It has also been alleged that you sought the repeal of the Walter-McCarran Law; advertised in the "Daily Worker" as a speaker at a memorial meeting for Premier Joseph Stalin; urged clemency for Rosenbergs; wrote letter defending Russia against charges of imperialism; participated in rally in honor of V. J. Jerome, Smith Act Subject; and urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania.

Your alleged participation in the following Communist activities indicates a following of the Communist Party line by you for years past; in 1937, speaker at symposium sponsored by American Committee for Anti-Nazi Literature; chairman of a meeting held under the sponsorship of the Friends of the Abraham Lincoln Brigade and
33 the American League for Peace and Democracy; in 1938, one of the Grand Marshals scheduled to lead the "March for Peace" at New York City sponsored by the American League for Peace and Democracy; member of the Citizens Non-Partisan Committee for Marcantonio to promote the candidacy of Vito Marcantonio, Congressman; member of "Citizens Committee to Support Israel Amter", Communist Party candidate in New York; in 1939 part of a delegation that appeared in Washington, D. C., to interview Senators on the Spanish Policy, sponsored by the Theater Arts Committee, the League of American Writers and the Musicians Committee to Aid Spanish Democracy; participated in May Day Parade; in 1940, signer of a petition to Governor Olson of California petitioning that Sam Darcy, a Communist extradited to

California for prosecution for perjury, be "freed"; in 1941 signer of a statement sponsored by the National Federation for Constitutional Liberties denouncing H. R. 1776; participated in May Day Parade; protested the U. S. Supreme Court's decision sustaining the conviction of one William Wiener, a Communist, on "trumped up" charges; visiting lecturer at White Mountain Writers Conference sponsored by the League of American Writers; endorser of the American Peoples Meeting at New York City; "Daily Worker issue" June 4, 1941, stated that you would speak at a Communist meeting; speaker at the 1941 Congress of American Artists Congress; active in the Schappes Defense Committee to defend Morris Schappes, a New York school teacher who was an admitted Communist; sponsor of a conference held at the Riverside Plaza Hotel to launch a city wide drive to free Earl Browder; in 1944 addressed a letter to President Roosevelt requesting his intervention in the current deportation of Mrs. Earl Browder; in 1945 signer of a statement printed in the "Daily Worker" supporting the eligibility of Communists in the Army for Commissions; Chairman of a Committee formed to sponsor support for the "Daily Worker" and the "Worker" and planned a campaign to raise $100,000.00 (you allegedly made the statement at a meeting of this committee that you had been able to think right during the years of the past due to the fact that you sought guidance in the column of the "Daily Worker"); aided in the launching of the People's Radio Foundation; sponsor of a group formed to support the re-election of Congressman Benjamin Davis, Jr., Chairman of this Committee was Paul Robeson; in 1946, speaker at a meeting sponsored by the National Council of American-Soviet Friendship; in 1948, sponsor of the Arts, Sciences and Professions for May Day; in 1949, sponsor for the "Committee for Free Political Advocacy" organized for the purpose of protesting the prosecution of the twelve Communist Party leaders in New York; spon-

sor of a United Labor and Peoples Conference for May Day to be held on March 26, 1949; sender of letter as President of International Workers Order to Judge Medina protesting the jailing of three Communist Party leaders who were under trial; signer of letter appealing to members of International Workers Order to contribute to a defense fund for the indicted leaders of the Communist Party; in 1950, signer of a petition sponsored by the Peace Information Center urging ban on use of atomic bomb; signer of a statement sponsored by the National Council of Arts and Sciences; speaker at the National Conference to Defend the Bill of Rights; in 1951, one of the founders of the American Peace Crusade; present at the founding meeting of the Peace Information Center and named its advisory counsel.

34 Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to

the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concerning the reasons why he was denied a passport or the Department's action in his case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State:
/s/ FRANCES KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "13"

35

Your Ref:
F130—Kent, Rockwell

July 2, 1955

Miss Frances G. Knight, Director
Passport Office
Department of State
Washington, D. C.

Dear Miss Knight:

My recent request for a passport was, as I stated in the accompanying letter, to attend the Peace Assembly in Helsinki, Finland, which was to open on June 22nd. Consequently, your letter of June 29th, infoming me that a passport would not be granted me is merely a verbal confirmation of an accomplished fact. I need hardly call your attention to the action on my application having been taken in seeming disregard of the recent decision of the

Federal Court of Appeals that no citizen could be deprived of a passport without due process of law.

That the Passport Office, having without a hearing declared me "guilty" and imposed its penalty, offers me an opportunity to prove my "innocence", and that the Board, or jury, before which I am invited to appear to plead my cause has been selected by the very authority that wrote the rules and made the ruling on them, strikes me as nothing less than grotesque disregard for basic principles of American justice.

Of the nature of the charges upon which the denial of my passport is based I will only say that a number suggest their resting upon "information" obtained through such illegal means as wire-tapping and the opening of mails and to conclude that the Department of State, in availing itself of "information" so obtained, may be held guilty of subornation.

A passport, as the recent court decision made clear, is the right of every American citizen. It is no more than an official certification of fact. The Department of State, having no authority under our Constitution to forbid a citizen to travel in foreign lands—except, as the Court has ruled, by due process of law—has circumvented this restriction upon its authority by taking advantage of the fact that most foreign countries make such evidence of citizenship a prerequisite to entry. The action of the State Department in withholding passports for the purpose of preventing travel is parallel to the frequent attempts made by the United States Post Office Department to establish itself as a bureau of censorship through limiting the travel rights of mail.

36 Just as the recent ruling of the Federal Court of Appeals has shown the Passport Office to have been guilty of violation of laws in the past, so, I predict, will a future ruling find that the withholding of passports from

American citizens on any ground whatever to be in open violation of the Ninth Amendment of our Constitution.

Faithfully yours,

ROCKWELL KENT

RK/sj

Exhibit "14"

38 DEPARTMENT OF STATE
WASHINGTON

In reply refer to
F130—Kent, Rockwell

July 19, 1955

Mr. Rockwell Kent,
Ausable Forks,
New York.

Dear Mr. Kent:

Your letter of June 24, 1955 addressed to the President of the United States has been transmitted to this office for attention. It has been made a part of the permanent records of the Passport Office.

On June 29, 1955, the Department notified you that the passport application which you executed on June 1, 1955, was tentatively disapproved on the ground that the granting of such passport facilities was precluded under the provisions of Section 51.135 of the Passport Regulations.

The Department regrets the delay in making the above decision. However, much research was required as your alleged background of Communist activities and affiliations covers a period from at least 1936 to date.

The details of the allegations concerning your Communist activities and the reasons for tentatively refusing

passport facilities to you were related in the Department's letter of June 29, 1955.

In the event that you are of the opinion that you are entitled to passport facilities under the Regulations, you may submit to the Department an affidavit stating whether you are now or ever have been a member of the Communist Party and it should include a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you. You may also present your case informally before hearing officers of the Passport Office if you so desire.

Sincerely yours,

/s/ FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "17"

41 DEPARTMENT OF STATE
WASHINGTON

In reply refer to
F130—Kent, Rockwell

Sep. 14, 1955

Mr. Leonard B. Boudin,
Rabinowitz & Boudin,
25 Broad Street,
New York 4, New York.

Dear Mr. Boudin:

Reference is made to your letter of September 2, 1955 in which you requested a final decision by the Department in the case of Rockwell Kent.

The record of Mr. Kent's case is in the process of being reexamined by various officers of the Department and a

report of evaluation is expected to be forthcoming in the near future.

You will be notified when a decision is reached.

Sincerely yours,

/s/ FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "20"

44 DEPARTMENT OF STATE
WASHINGTON

Sep. 29, 1955

In reply refer to
F 130—Kent, Rockwell

Dear Mr. Boudin:

The Department has received your letter of September 20, 1955 with further reference to the passport case of Rockwell Kent.

You are informed that this office is not in a position to take further action on Mr. Kent's case pending the report of its evaluation by another office of the Department. However, in the meantime, this office will accord Mr. Kent an informal hearing of the nature outlined in Section 51.137 of the Passport Regulations if he wishes to make any statement in explanation or denial of the allegations set forth in the Department's tentative refusal letter.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office.

MR. LEONARD B. BOUDIN
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

17 **Exhibit "23"**

October 27, 1955

Mr. Scott McLeod
Administrator
Bureau of Security and Consular Affairs
State Department
Washington, D. C.

Dear Mr. McLeod:

This will confirm my telephone conversation of today with Orson Trueworthy, your Special Assistant.

I had requested action upon the passport application of my client, Mr. Rockwell Kent, which has been pending since June of this year. Mr. Trueworthy telephoned me to suggest that an informal hearing be held on November 4, 1955.

I advised Mr. Trueworthy that we desired to attend any conference, informal hearing or hearing, which would result in a final decision upon Mr. Kent's request for a passport. However, my client has taken the position that the Passport Office's demand for an affidavit under Section 51.142 of the Regulations is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand.

The Passport Office has taken the position in other cases that unless the passport applicant executes such an affidavit, there is no point to a hearing, since it will neither issue a passport, nor render a final decision. Similarly, the Board of Passport Appeals has taken the position that in the absence of an affidavit and of a final decision, it will not entertain an appeal.

I should like to be advised by you, by return mail if possible, whether my understanding of the situation as set forth above, is correct. Obviously, there is no point to a hearing if we are advised in advance that following it, we will receive neither passport nor decision.

On the other hand, it would be most unfair if the Department in litigation which will follow would assert that it

would have given us a hearing and decision even without the affidavit if we had requested such a hearing.

I am sure that the Department would not wish this misunderstanding to occur. Therefore, would you be kind enough to advise me that my statement of the Department's position is correct, and that it will not be claimed that Mr. Kent withdrew or waived his right to an informal hearing which could not result in a passport or decision.

I understand, of course, that the Department will argue in the ensuing litigation that the affidavit requirement is a lawful condition to a hearing and decision; our position will be to the contrary.

Sincerely yours,

LEONARD B. BOUDIN

LBB:RP

Exhibit 24

TRANSCRIPT OF HEARING

[The interview was opened at 2:25 p.m.]

Mr. Nicholas: This is an informal hearing as provided in Section 51.137 of Title 22 of the Code of Federal Regulations in the case of Mr. Rockwell Kent, an applicant for a passport.

Mr. Johnson, will you proceed?

Mr. Rein: May I ask a question first? I don't know, Mr. Nicholas, whether you got the message I left in your office earlier today, but I noticed in going over the correspondence or the letter that was last sent to Mr. Kent that there was some reference to something on an earlier passport of Mr. Kent's, a certain restriction on that passport, and I have asked Mr. Kent about it. Mr. Kent says he has no recollection of ever having seen it. And I asked, but he doesn't have it to check it, whether we could have a copy, not a copy but that passport here, so we could look at it.

Mr. Nicholas: I got your message too late to get the passport. The passport isn't in the building. It has been

sent away and we didn't have a chance to get it, you see. If we had gotten your message a couple days sonner we would have had it here. We have here the record of the issuance and the record of the extension. We can
2. show you the files, showing what passport facilities were granted both times. It was a case, as I recall, of Mr. Kent being issued a limited passport for one trip and then extended for another trip, made valid for certain countries. Does that agree with your recollection, Mr. Kent?

Mr. Kent: My recollection, that is all. But I haven't seen the passport since I sent my passport to Mrs. Shipley and didn't get back what I paid for.

Mr. Nicholas: We will get the passport and let you examine it, but we were not able to get it for today.

Mr. Rein: Well, it is probably not of any real significance, but I did discuss it with Mr. Kent and Mr. Kent told me, I think he has already written a letter, which you have in the files, concerning the business of a trip he made to some other countries, and he says he has no recollection of this limitation on page 13. I will ask Mr. Kent now about that.

Mr. Kent: I will state that now.

Mr. Rein: Not that he just doesn't remember it now, but he doesn't recall ever having seen it. Perhaps he hasn't read that far, I don't know.

Mr. Kent: I remember a beautiful green ink stamp "Not good for Yugoslavia", but that is all of that sort I remember in the passport.

3. Mr. Nicholas: Well, we will get the passport later and let you look at it and we will notify Mr. Rein when we get it. But now we have the applications and various things which we are going to show you and put in the record. So, Mr. Johnson, will you go ahead now?

Mr. Johnson: Mr. Kent, we have here an application which indicates it was executed on June 1, 1955—

Mr. Kent: Yes.

Mr. Johnson: —at Elizabethtown, New York.

Mr. Kent: That's right.

Mr. Johnson: I'd like to show you this application, Mr. Kent, and ask you whether or not that is the application you executed on that date? [Showing Mr. Kent the application]

Mr. Kent: That's right, that is it.

Mr. Johnson: I'd like to offer this as part of the passport record.

Mr. Rein: I have no objection. I'd just like to look at it for a second.

Mr. Nicholas: All right, without objection, that will be a part of the record.

[Dept. of State Passport Application Form DSP-11, together with photograph of Rockwell Kent, dated June 1, 1955, was admitted in evidence and marked as Exhibit 1.]

Mr. Johnson: I'd like to show you, Mr. Kent, a passport application which was executed on August 2, 1955, at Plattsburgh, New York, and also a letter dated August 2, 1955, and signed "Rockwell Kent", referring to the application and also referring to what I presume is this application (indicating Exhibit 1) of June 1, 1955. The opening sentence states, however, "On May 28th I made application", which I think is probably in error because this is probably the one you're referring to.

Mr. Kent: I don't know why there is a difference in date.

Mr. Johnson: Well, here is the application of August 2 and also the letter to which I refer and I will ask you if you can identify that. [Handing the application to Mr. Kent.]

Mr. Kent: That is it.

Mr. Rein: I have no objection. You can go ahead.

Mr. Nicholas: Without objection, that will be admitted in evidence and made a part of the record.

[Dept. of State Passport Application Form DSP-11, dated 2 August 1955, together with typewritten letter signed "Rockwell Kent" to the Passport Office, dated

August 2, 1955, and photograph of Rockwell Kent were admitted in evidence and marked as Exhibit 2.]

Mr. Johnson: On June 29, 1955 the Passport Office directed to you, Mr. Kent, a letter setting forth the reasons for the denial of passport facilities to you. It specifically referred to the passport of June 1. I wonder if you or your counsel will stipulate that this letter would also be on the same basis as the application of August 2, as applied to the both applications that we have here.

Mr. Rein: Well, yes. As I understood it, we got a letter from Mr. Cartwright that said that we could assume that there was a tentative denial on August 2 on the basis of the letter of June 2, and that is perfectly agreeable.

Mr. Kent: Since they were for different purposes. But my position is that the purpose is—

Mr. Rein: Well, that letter doesn't refer to the purposes of your trip, Mr. Kent. It refers to the organizations you belong to and presumably the State Department position is they don't care what the purposes of your trip are.

Mr. Kent: Yes.

Mr. Johnson: I have a copy here of this letter. I wonder, for the purposes of saving time, if we could admit the letter into the record and make it a part of the record and when the reporter transcribes the case, if she will just set forth the letter in its entirety as part of the record, if that will be all right.

Mr. Rein: Is this the one we had a photostat of?

Mr. Kent: I didn't read it all. I guess it's the letter.

Mr. Rein: [Examining the letter] Yes, it seems to be.

Mr. Nicholas: Without objection, it is admitted in evidence.

Mr. Rein: Let me ask you. I think you want to make it clear that this letter is also to be considered, even though it's earlier in date, in reply to the August passport application?

Mr. Johnson: That is it exactly.

Mr. Nicholas: It will be considered as the grounds for the tentative refusal of both applications.

[Carbon copy of 5-page typewritten letter dated June 29, 1955, from Frances G. Knight to Mr. Rockwell Kent, was admitted in evidence and marked as Exhibit 3.]

Mr. Johnson: I'd also like to show Mr. Kent a letter dated June 25, 1955, and addressed to the Passport Division, Department of State, signed "Rockwell Kent", in which was transmitted a press bulletin, a mimeographed copy of what purports to be a press bulletin published by the Information Service of the Secretariat of the World Council of Peace. I'd also like this to be admitted as part of the record and I will ask Mr. Kent whether he recognizes that. [Showing the letter and press bulletin to Mr. Kent]

16 Mr. Kent: Yes, that is part of it.

Mr. Rein: I'm sure that Mr. Kent has no objection to any letter he has ever sent going in the record, but I would like to indicate that on the surface this has no relevance to the present passport application because it refers to a purpose in a previous application which has already expired, whatever it may be. In other words, the application in May was to attend a specific conference June 22nd, was it?

Mr. Kent: June 22 it opened.

Mr. Rein: June 22, and it is already over, so the present application could have no reference to a conference which has already ended. As I say, from that point of view, it seems to me it is irrelevant.

Mr. Johnson: Maybe at this time I will refer back to the application of June 1, 1955, which indicates that the countries to be visited are Finland and England, and the purpose of the trip was to attend a peace conference.

Mr. Rein: Well, that is perfectly right. My only point is that that has been aborted by Mr. Kent's failure to go.

Mr. Johnson: Yes, sir.

Mr. Rein: And the present application has no reference to attending any peace conference because that par

17 ticular peace conference which Mr. Kent wished to attend has been held and is all over.

Mr. Kent: May I look at this just a moment?

Mr. Johnson: Yes, sir. [Handing the letter and press bulletin to Mr. Kent.]

Mr. Rein: That ought to be clear.

Mr. Johnson: Well, the application of August 2, 1955 shows that the countries to be visited are England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy, Czechoslovakia; and the purpose of the trip "prosecution of profession and pleasure". I think that covers it.

Mr. Rein: May I ask Mr. Kent just a question or two that I think would clarify this? I wonder if you would tell now for the record, Mr. Kent, what you told me in your office, that when you first filled out this application you just wanted to put down European countries.

Mr. Kent: Yes, sir.

Mr. Rein: I wonder if you would clarify that.

Mr. Kent: I live on the borderline of two counties, one is Essex County and the other one is Clinton. The previous application was made at the Essex County office at Elizabethtown. But we happened to be going to Plattsburgh, which is a shopping center and when I was
18 there I went to the County Clerk there and when I said, "I want to visit European countries", he said, "You can't do that. I got to have the names of all the countries." I said, "I don't know. I want to go to Europe and travel around." He said, "Nope, you got to give me the names." So I just gave him names while he was typing until the thing was filled up. I might have gone on indefinitely. I could have thought of all the countries in Europe. Not that I intended to go to all of them, but I wanted a passport to go where I pleased. He said, "I also don't want to be pulled into court for this." I said, "Don't worry, you won't be pulled into court."

Mr. Rein: In other words, to make it clear, when you put down certain European countries it was just to satisfy the clerk and you merely meant your passport to be valid

for travel in Europe, including all countries without any countries specifically, and that is what you would like your application to cover?

Mr. Kent: Exactly. There is another question I'd like to ask. Not hearing from the Passport Office, I wrote to the President, and I believe that that letter was sent to the Passport Office. If it has been, I'd like to have it in the record.

19 Mr. Nicholas: Well, suppose we look to those things directly and let Mr. Johnson go ahead with putting these things into the record. I think this letter of June 15, 1955 and its enclosure is pertinent to a certain extent. It showed what Mr. Kent intended to do on the trip when he made the first application.

Mr. Rein: Surely. We have no objection.

Mr. Nicholas: That is the only purpose.

Mr. Rein: We have no objection for it being in there for what it is. I make it perfectly clear and I'm sure Mr. Kent would want to make it perfectly clear too, if there were another peace conference he would want to attend and would want to go. He is not withdrawing from that, but I want to make it clear the present application has no reference to the peace conference. I don't want to indicate, Mr. Kent, that you are withdrawing from your desire to go to another peace conference.

Mr. Kent: If one were held, I would want to go. I'm for peace.

[Typewritten letter dated June 15, 1955, signed by Rockwell Kent, addressed to Passport Division, Department of State, together with Press Bulletin dated June 9, 1955, was admitted in evidence and marked as Exhibit 4.]

20 Mr. Johnson: I'd like to show Mr. Kent a passport application which shows that it was executed on April 14, 1949, at New York City and ask him whether he executed that application. [Showing the application to Mr. Kent]

Mr. Kent: I will just look at my signature. That is mine, yes.

Mr. Rein: Well, I have no objection to its going in. I just want to examine it for my purposes of my own information.

Mr. Nicholas: Without objection, it is admitted.

[Dept. of State Passport Application Form DSP-11, dated April 14, 1949, together with photograph of Rockwell Kent, was admitted in evidence and marked as Exhibit 5.]

Mr. Johnson: The application to which I have just referred shows that the countries to be visited were France and England, and the purpose of the trip was "Attending Peace Congress in France. Visit wife's relatives in England." In connection with that application, I'd like to show Mr. Kent a letter addressed to the Department of State, Washington, D. C., dated April 14, 1949, New York, and ask him whether he has seen that letter and can he identify it. [Showing the letter to Mr. Kent.]

21 Mr. Kent: Yes.

Mr. Johnson: I'd like to admit this letter in evidence.

Mr. Nicholas: Without objection, it is admitted.

[One-page handwritten letter dated April 14, 1949, to the Dept. of State, from Rockwell Kent, was admitted in evidence and marked as Exhibit 6.]

Mr. Johnson: Mr. Nicholas, I will have to ask your assistance on this. I will show you some records of the Passport Office in connection with your application, Mr. Kent. You can tell here that the passport was issued [indicating Exhibit 5.]

Mr. Nicholas: This passport was issued in New York City on April 14, 1949, which shows "Approved, Mr. Nicholas and Mr. Siegel." This attached paper, which was initialed by Mr. Siegel, covers the authorization to the

Passport Agency to issue the passport, and it said, "Authorize 60 days British Isles, France." So the passport which you received at that time in 1949 was valid for 60 days and for travel to the British Isles and France.

Mr. Kent: Yes.

Mr. Nicholas: That was in accordance with your request contained in this letter of April 14, 1949 [indicating Exhibit 6], saying that you wanted to go to France to attend the World Congress for Peace and to England to visit your wife's relatives.

Mr. Kent: That's right.

Mr. Nicholas: Without objection, that will be admitted in evidence.

[One-page handwritten authorization by Mr. Nicholas and initialed by Mr. Siegel, was admitted in evidence and marked as Exhibit 7.]

Mr. Nicholas: Then here is a letter from Mr. Louis E. Spiegler, Attorney at Law, dated February 27, 1950, requesting an extension of the passport issued to you in 1949, Mr. Kent. This paper, which is attached and headed "PP 2501, NYS, Rockwell Kent", is a paper which I made out on February 27, 1950, authorizing the validation of your passport for travel in France, British Isles, Sweden, Norway, and Denmark.

Mr. Kent: Yes.

Mr. Nicholas: And that passport was picked up in the Department, presumably by Mr. Spiegler or Mr. Alpher, who represented you, and you received the passport.

Mr. Kent: Oh, yes, I did. It was a rush thing and I was told—I have never met Mr. Spiegler, but I was told a Washington lawyer could get it through quickly.

Mr. Nicholas: Any objection to that being admitted in evidence, Mr. Rein?

Mr. Rein: No, no objection.

Mr. Nicholas: Without objection, that letter and paper are admitted in evidence.

[One-page typewritten letter dated February 27, 1950, to Mrs. Ruth B. Shipley, signed by Louis E. Spiegler, with a handwritten notation at the bottom signed by S. M. Alpher, together with a handwritten paper dated 2-27-50, initialed AJN, was admitted in evidence and marked as Exhibit 8.]

Mr. Rein: I just want to make one question to Mr. Kent. You never saw this correspondence?

Mr. Kent: No. That was addressed to Mrs. Shipley; no, I never saw that.

Mr. Nicholas: Mr. Spiegler wrote the letter?

Mr. Kent: That is the first time I have seen it.

Mr. Rein: What communication did you have with Mr. Spiegler with reference to this? Do you recall what communication you had with him?

Mr. Kent: No, I think I must have told him the countries that I intended to travel through.

24 Mr. Rein: Were you abroad at the time?

Mr. Kent: No, I was in New York. As I recall it, the passport arrived just about the last minute. There wasn't much time. He got it through quickly. Yes, they sent a special messenger and met me at the airport with the passport. It was really a rush job.

Mr. Rein: Do you have any recollection of your conversation with Mr. Spiegler?

Mr. Kent: I don't think I ever spoke to Mr. Spiegler. I think that I wrote him. I may have phoned him, but I think I wrote to him.

Mr. Rein: Let me ask one other question. What you would have written to him was substantially what he wrote to the State Department, or don't you recollect?

Mr. Kent: [Examining Exhibit 8] Yes, that's correct. That is just what I would have asked for—presumably did.

Mr. Rein: I think that makes it clearer.

Mr. Nicholas: Yes. And you received what you asked for, Mr. Kent?

Mr. Kent: Yes. I guess you gave it to me.

Mr. Nicholas: Yes.

Mr. Johnson: Mr. Kent, I have here a, shall we say, volume [indicating Mr. Kent's book, "It's Me O Lord"].

25 Mr. Kent: I had hoped you bought it. It cost $10 and I would get a dollar out of it.

Mr. Johnson: It's $7.50, isn't it?

Mr. Kent: No, $10 and worth $12.50.

Mr. Johnson: I'd like to offer this book in evidence and I will identify it. It is entitled "It's Me O Lord", the autobiography of Rockwell Kent, published by Dodd, Mead and Company at New York, and—

Mr. Kent: In 1955.

Mr. Johnson: —and copyrighted in 1955 by Mr. Kent.

Mr. Rein: I'd like to make a few comments.

Mr. Johnson: Do you mind—I'll offer this and refer to various passages in the book and maybe ask Mr. Kent if he wishes to make any comments in addition to what he has in his book concerning the various excerpts which I will read to him.

Mr. Rein: I think we can make our position clear in advance and maybe save some time. I'm sure Mr. Kent is happy to have the State Department read the book and he certainly stands behind the book.

Mr. Kent: Yes, I do!

Mr. Rein: But I take the position in behalf of Mr. Kent—and I will ask him to repeat it—that anything that appears in the book will not be at all relevant to

26 whether or not he gets a passport, although he is certainly very glad to have anybody in the State Department read the book. I want to indicate that I have, under force of circumstances, to make a sort of limited objection on the ground that we don't see where it has any bearing on this proceeding; although, on the other hand, we are perfectly happy to have the State Department read it. I think the position is clear. Perhaps Mr. Kent might want to add a word on it.

Mr. Kent: That is my position exactly. I'm an American citizen and I look upon a passport as an official certification of my citizenship.

Mr. Nicholas: I think—

Mr. Johnson: I'd like to offer it and, as I have said before, I'd also like to read some excerpts from the book.

Mr. Nicholas: Conceding that Mr. Kent wrote the book—

Mr. Rein: There is no question about that!

Mr. Nicholas: I think that it is pertinent, or rather could be pertinent on the question of whether his case falls within the present Passport Regulations. And for that purpose it will be admitted in evidence. I don't think that is exactly the point you had in mind, Mr. Rein.

27 I think you had more in mind, regardless of our Regulations, that he is entitled to a passport.

Mr. Rein: That's correct.

Mr. Nicholas: But this is relevant to the question of whether his case falls within the Regulations.

Mr. Rein: I want to make it clear that we object to the book being brought into evidence, but I don't want you to draw any conclusion from that that Mr. Kent wishes to withdraw from or disavow or not stand behind anything he said in the book. The position should be clear. We just don't think it's any business of the State Department in connection with getting him a passport. I won't say it isn't the business of the State Department in any other connection, because I think it's a good book for the State Department to have.

Mr. Kent: That is exactly my position.

Mr. Nicholas: [Off-the-record discussion]

Mr. Johnson: Mr. Kent, in your book on pages 483 and 484 you recite a set of circumstances surrounding the unauthorized rental, I suppose, of your home there at Au Sable Forks. I think there was some undesirable tenant or the fact you didn't want the property leased. I believe that was the question.

Mr. Kent: I'm glad to discuss the book.

28 Mr. Johnson: Just a moment. And then you refer to the fact that the rental you received, which amounted to some hundreds of dollars, let's see, you sent $800 of it to the Communist Party. You looked the Communist Party up in the phone book and then you mailed a check to them. Then you recite in your book the statement, "A substantial part of the money, Browder wrote me, would be devoted to the defense of Tom Mooney. That, with the thorough fumigation of our house which Frances, at my request, had seen to, wiped the stain from Asgaard." I'd like to know whether that statement is a correct statement of your donation of $800 to the Communist Party at that time?

Mr. Kent: It—

Mr. Rein: One second, Mr. Kent, before you answer that. I don't want to interrupt—you can add anything you want to say—but I think we made clear that in order to cut this short, I think Mr. Kent has indicated that he stands behind everything in his book, but we can't concede the relevancy of any of these matters to this particular hearing, and Mr. Kent is not going to go into it and discuss it. I'm sure that Mr. Kent is anxious, however—outside of the connection with the passport hearing, because his principle is that it has no relevancy—I'm sure he will be perfectly happy to talk about that with
29 you or anybody else, as he obviously has. I don't know if you want to—I'm also making the suggestion, Mr. Johnson, on the theory that perhaps it might show up in the hearing, I don't know.

Mr. Johnson: Well, there are certain passages in the book which I feel that maybe Mr. Kent would like to comment upon or give any additional explanation he might have concerning them, other than what appears in his book. That is why I'm going along, if you will notice, the letter denying him passport facilities sets off certain grounds—Communist membership, affiliation, etc., and

activity in the Communist fronts. So on that theory I believe the relevancy of these excerpts is apparent.

Mr. Rein: Well, Mr. Kent has made his position clear, I think, in refusing to consider the allegations in the letter. He is not going to depart from that position here.

Mr. Nicholas: Well, now, Mr. Kent, you concede that anything in the book is accurate.

Mr. Rein: I would think so!

Mr. Kent: I do. Though I don't make that concession as evidence in this passport application because I consider it, as Mr. Rein has said, completely irrelevant. Though in defense of my book, everything in the book is as true as I could possibly make it without hurting other people's feelings.

Mr. Rein: Perhaps to help Mr. Nicholas out, if you want a concession of what appears in the book—other than it seems to me is apparent from the face of the book, it has been recently written and Mr. Kent wrote it—if you want a concession in addition to that that it is acurate and true, we would be glad to make such a concession; but we don't think it has any bearing on this proceeding.

Mr. Nicholas: As I said before, I think certain things in the book are relevant to the question as to whether Mr. Kent's case falls within our Regulations. Now, Mr. Rein, you take the position, I think, that our Regulations are invalid.

Mr. Rein: That's correct. I'd also like to indicate, in order to save time that we would be perfectly happy to concede everything that is in the book. I'm certain and perhaps Mr. Kent can indicate whether he agrees with me, that he has no desire in this proceeding to comment on that or to amplify or disqualify or modify anything he has said in the book for the purposes of this record. So I think if you believe that the book is relevant, I think you have the book and we can go on to something else, without wasting time.

Mr. Nicholas: Then suppose, instead of reading into the record anything that you think is pertinent to the question, that we would merely insert quotations from the book in the record and with the understanding that Mr. Kent says whatever is in the book is true?

Mr. Kent: Correct, that's right.

Mr. Rein: You don't particularly care to amplify on it, do you, Mr. Kent?

Mr. Kent: Do I what?

Mr. Rein: You don't particularly want to amplify on it, do you?

Mr. Kent: No, only because my position is that it is irrelevant.

Mr. Rein: Or modify it?

Mr. Kent: No.

Mr. Johnson: I still think on page 493, I would like to read this excerpt, if you don't mind. And, if you will notice, there are not many that I have marked in the book and some of these I won't refer to. I would like to mention to you I would like to spell out in the record certain passages and I think that that would be relevant.

Mr. Rein: As long as our position is clear, as I say, you should read whatever you wish to read.

Mr. Kent: I'm perfectly willing that you should insert the whole book into the record, or any of the passages.

Mr. Nicholas: Suppose you read them to us quickly and we won't interrupt.

Mr. Johnson: On page 493: "It is April of 1954 as I now write. The 'troublemakers' of today, those Communist leaders many of whom were active in the preservation of our democracy in the pre-war decade or heroes in the defeat of Fascism on the battlefield, are safely in prison; many others are on the prison road. Thousands of the men and women whom I have characterized as of good mind and heart have been publicly denounced and stripped of employment and means of livelihood. Intern-

ment camps, we're told, are in readiness for tens of thousands more. Our Attorney General, in a public address, assured the nation that the Government, acting through Congressional committees, spies, police courts, now has the situation well in hand. It is a government well entrenched in power that the Attorney General speaks for. It is the government of all those pre-war supporters of Fascism in America—of all the rich and powerful of that group, down through the little *Fuehrers* and their serried followers to the lowest murderers of the Black Legion. It can't happen here? Don't make us laugh: it almost
33 has. And when, glancing over our Government's official list of organizations, meetings, banquets, petitions, letters, etc., etc. subversive to Fascism here and abroad, I find that since 1935 I'm credited with part in only eighty-five, I am ashamed."

There is also a passage in the book on page 572 which Mr. Kent indicates is an endorsement of Browder and Ford in 1936.

Mr. Kent: I do. And I told why.

Mr. Johnson: And continues—I'll read this portion: "I don't count my endorsement of Browder and Ford in 1936, and my titular chairmanship of the Committee of Professionals for Browder and Ford. Involving no activity on my part, it amounted to an endorsement of principles and a statement of position. The principles I endorsed were outlined in the party platform. Beginning with a statement that we faced a crisis in which 'extreme reaction threatens the country, driving toward fascism and a new world war,' and calling for common action 'to overcome this crisis in an American way . . . in the interests of our people and of our country', it proceeded with a program that, stressing opposition to child labor and Jim Crow, supported the more advanced measures of the New Deal.
34 It was a New Deal platform cleared of the compromises that had marred the New Deal's functioning. With Roosevelt's re-election assured, it

seemed important to emphasize support of his more liberal trends. The Communist election platform did just that."

I'd like to also read a passage from the book on page 584 and it concerns Mr. Kent's trip to Moscow in March 1950, I believe it was.

Mr. Kent: Yes, I think so. I'm a little hazy about dates.

Mr. Johnson: "Our Moscow delegation consisted of thirteen men and women and included, in addition to representatives of several of the west European countries, the Reverend James Endicott of Canada and, from America, one O. John Rogge and me. Accompanying us was the American journalist, Johannes Steel. A New York business lawyer who, following his appointment as Assistant U. S. Attorney General, was sent to Germany to investigate the underlying causes of the war, Rogge had shown some courage in publicizing facts that pointed to or proved the involvement of American interests—inviting thereby just what he received: dismissal. Thrown thus fortuitously into anti-administration ranks, he was embraced by the Progressive Party and rashly elevated to party prominence. Ambitious to 'succeed', he suffered by the party's 1948 defeat and rout; and, now discredited in business circles, he sought employment by the Soviet Union and Poland. He failed; and turning next to Yugoslavia, was hired. If was then, as a paid agent of that country—a *secret* agent in the sense of having kept his new employment unannounced—that he accepted the invitation, and the accompanying tender of expenses, to speak as a representative of the American people before the Supreme Soviet in Moscow. And it was, in effect, as an agent of his new employers that he spoke.

"His speech—purposefully and, I would say impertinently critical of the Soviet Union's internal affairs—was, as I have said, widely publicized in America and hailed by some as an expression of outstanding courage. That it was hardly that is evidenced by the fact of its

having been read in advance by our Russian hosts and, despite its violation of the purpose of our mission, permitted.

"Once—I blush at recounting this episode of my irresponsible youth—high with good cheer and exasperated by a great sign reading SILENCE!, I had yodelled in that holy of holies, the library of the University Club in New York. Well, O. John Rogge, a grown-up man and an ex-Assistant Attorney General of the United States, yodelled in the Kremlin."

36 Mr. Kent: That is just about what it was.

[Blue, cloth-bound book entitled "It's Me O Lord" by Rockwell Kent, was admitted in evidence with leave to withdraw and was marked as Exhibit 9.]

Mr. Johnson: Now, in connection with your trip to Moscow, as you indicate in your book, your appearance and the appearance of Rogge and Steel was very much publicized in the United States.

Now, a digest of the Soviet press dated April 29, 1950, contains this passage. I will read it to Mr. Kent and ask him whether what are stated to be his remarks at the conference are correctly reported or whether they are in fact the gist of what you may have stated at the time. I will read from this digest.:

"The words of Rockwell Kent, American artist and Chairman of the International Workers Order, were received with prolonged applause: 'As a member of this peace delegation and as a fighter for peace', he said, 'I must tell you that I am not an official representative of the American Government. To be honest, I say that this Government is not my government and does not represent me. You Soviet people are in the hearts of many Americans.'"

Now, do you recall that part of your statement?

37 Mr. Kent: I recall it very well.

Mr. Johnson: That was very much publicized.

Mr. Kent: Yes. I will add this—this is not to the credit of the Passport Office—that my prompt repudiation of that translation is in your records. It was in a letter to Mrs. Shipley. It was also published in the *New York Times*. That you, having that in your records here, should refer to this now discredited statement surprises me.

Mr. Johnson: You're just a little too quick. You jumped to a conclusion.

Mr. Kent: All right, but it was written to me in this recent letter from Miss Knight.

Mr. Johnson: I'd like to show you this letter of March 18, 1950, addressed to Mrs. Ruth Shipley and signed "Rockwell Kent" and ask you whether you recall that. [Handing the letter to Mr. Kent]

Mr. Kent: Yes.

Mr. Johnson: I'd like to show you an enclosure to that letter, which is dated March 18, 1950, and ask you whether you recall that. [Handing the enclosure to Mr. Kent.]

Mr. Kent: That is right, that is exactly right.

Mr. Nicholas: That is the letter of correction to which you referred?

38 Mr. Kent: Yes, that was also published in the *New York Times*.

Mr. Johnson: I'd like to read this into the record so that we will be perfectly fair. Since I have read the passage from the book, I intend to read this too.

Mr. Rein. Well, I think you should read it with the indication that Mr. Kent has said the correct version as you're now going to read it according to Mr. Kent's testimony.

Mr. Johnson: That's right. This is a carbon copy of a letter addressed to the Editor in Chief, TASS, Moscow, U.S.S.R.

"Dear Sir:

"The New York Times of March 8th, under a London dateline, quotes TASS as having reported that in a speech in Moscow I had stated that the United States government

is not my government." I have full recollection of my own words in my Moscow speech, and they were as follows:

"'As a member of this peace delegation and as a fighter for peace I must tell you that I am not an official representative of the American Government. I must also say, in respect to my own integrity, that the American government is not representative of me.'

I realize that the words incorrectly attributed to me were due to the difficulties of translation. I would appre-
39 ciate your making public the corrected version of my statement.

"Lest the error in the translation be held as a reflection on the ability of my translator on the occasion of my speech, I would like to state that he was in general an interpreter of unusual competence for whose devoted assistance throughout my stay I am deeply grateful.

"I am, Sir,

"Very truly yours,

"Rockwell Kent"

I'd like to admit these two papers as part of the record.

Mr. Nicholas: Without objection they will be admitted, as modifying the extract which you previously read into the record.

Mr. Rein: As stating the correct version.

Mr. Nicholas: As stating the correct version.

[Typewritten letter dated March 18, 1950 to Mrs. Ruth Shipley, signed "Rockwell Kent", together with enclosure of a letter from Rockwell Kent to Editor in Chief, TASS, dated March 18, 1950, was admitted in evidence and marked as Exhibit 10.]

Mr. Kent: I believe that that is in my book, too.

40 Mr. Johnson: Yes, sir. Mr. Kent, your book also refers to a meeting on July 1, 1953, before the

United States Senate, the Senate Permanent Subcommittee on Investigations of the Committee of Government Operations. That was a committee in which Senator McCarthy and Stuart Symington were present, in addition to others. Your book, on page 611, refers to your appearance before the Senate Committee.

Mr. Kent: Yes.

Mr. Johnson: It gives your stand. You also state that you had given a statement to the press and that it was only the *York* (Pa.) *Gazette* that published your statement.

Mr. Kent: As far as I know. Too bad the Lamont case hadn't come off by then.

Mr. Johnson: I don't have that press statement and Mr. Kent apparently just quotes—

Mr. Kent: I just quote from it.

Mr. Johnson: He quotes excerpts from the statement. But it does concern the hearing before the Committee.

Mr. Kent: No. It doesn't appear, because I would not answer the $64 question of the Senators and, therefore, I was not allowed to introduce my statement.

Mr. Johnson: The statement itself does not appear.

41 Mr. Kent: Does not appear, that's right.

Mr. Johnson: I have here what purports to be an account of that hearing and I'd like to offer this and make it as part of the record. It's headed "State Department Information Program Information Centers", Wednesday, July 1, 1953, United States Senate, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, Washington, D. C. This report indicates that the Subcommittee met on January 30, 1953 at 10:30 a.m., in Room 318, Senate Office Building with Senators Joseph R. McCarthy, Chairman of the Subcommittee presiding, and at which were present in addition to Senator McCarthy, Senator Stuart Symington and apparently Members of the Senate Staff. There is here an account of the questions that were propounded to Mr. Kent and

his statements in reply to those questions. If there is no objection, I'd like to enter this.

Mr. Rein: Well, I object on the ground I have previously stated, I don't think that it has any bearing on this hearing. [Examining the document] Don't you have an official Committee print you could put in the record?

Mr. Johnson: We will obtain it.

Mr. Kent: My only objection is that the courts have ruled that that whole line of investigation was without authority. So you are submitting a report of a committee which was not authorized to conduct the investigation.

Mr. Rein: This isn't a report. This is what you said at the hearing.

Mr. Kent: Yes, but the hearing was illegal.

Mr. Rein: I would think so. But we don't think it has any bearing on this proceeding anyway. I don't think it adds anything to what you have already got in Mr. Kent's book. I would suggest, if you're going to submit it, you ought to at least submit an official print.

Mr. Nicholas: This is really a copy made from the printed material.

Mr. Kent: Yes, I have the printed record of it.

Mr. Nicholas: You have read it?

Mr. Kent: Yes.

Mr. Rein: We have read the printed record.

Mr. Nicholas: Was the printed record accurate, as far as you know?

Mr. Kent: Yes. I think they did a little editorial—well, they edited it a little, but nothing damaging from my point of view.

Mr. Rein: I think it's correct. I don't want to be technical, but if you're going to submit it for the purpose of anybody reading it, it certainly isn't legible.

Mr. Nicholas: I think it is revelant. His answers rather are relevant to the questions.

Mr. Rein: Including his refusals?

Mr. Nicholas: As to the question whether his case falls within the present Passport Regulations.

Mr. Kent: It almost eliminates my perfectly correct charge that I was there on my own free will, since the subpoena served on me without signature and was of no more value than an unsigned check—but that was soft-pedaled.

Mr. Nicholas: But there were no statements in the printed record you would want to change?

Mr. Kent: No.

Mr. Nicholas: So I think we will admit it for what it is worth, as to whether it comes within the Regulations or not.

Mr. Rein: You will note our objections on the ground as previously stated.

Mr. Nicholas: Yes.

[Transcript of U. S. Senate, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, dated July 1, 1953, was admitted in evidence and marked as Exhibit 11.]

44 Mr. Johnson: Mr. Kent, your book also has a reflection on your membership in numerous organizations. As I indicated here from the excerpt on page 493 of the book, there are also passages in the book which show your connection and affiliation over a long period of time with the International Workers Order.

Mr. Kent: I was its President.

Mr. Johnson: From, what was it, 1936, I believe wasn't it?

Mr. Kent: I don't know. Whatever is in the book is right.

Mr. Rein: Although he says he is President of the International Workers Order, he is not conceding its relevancy.

Mr. Kent: No, I can't concede the relevancy of any of this, not from my point of view.

Mr. Johnson: And the book also reflects that your membership in the Committee that drafted the Stockholm Peace Appeal—

Mr. Kent: And that I wrote to Secretary Acheson about it and all that, yes, sure.

Mr. Johnson: That is on page 586 of your book.

Mr. Kent: Yes.

Mr. Johnson: Your account of your affiliation with the International Workers Order commences on page 595.

Mr. Kent: I believe that chapter is headed "The Liar", isn't it?

Mr. Johnson: That's right.

Mr. Kent: Referring to Mr. Budenz.

Mr. Johnson: Yes, it is.

Mr. Kent: I have not been sued. It was at that hearing that Budenz answered to a reprimand from the Judge and said, "Well, you have to be careful what you say out of court."

Mr. Johnson: Mr. Kent, under the Regulations, the Regulations provide that you submit a sworn statement relative to your membership in the Communist Party. And, under the Regulations here, Section 51.135, there are various subdivisions; you will notice from the Supplement to the Passport Regulations that Mr. Nicholas has just given you and which your Counsel has here that under Section 51.135 there is a certain limitation on the issuance of passports to persons supporting the Communist movement.

Now, subdivision (a) provides that:

"Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party."

I would like to call your attention to that particular subdivision and ask whether or not you are now willing to submit a sworn statement or a statement subscribed to and sworn to under oath or affirmation as to whether or not you are a member of the Communist Party?

Mr. Kent: You, of course, having read my book know perfectly well that I have already answered that question under oath. But, as a matter of principle, I will not answer it here.

Mr. Johnson: You refuse to submit a sworn statement, Mr. Kent?

Mr. Kent: I do; yes.

Mr. Johnson: Now, under Section (b):

"Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement."

Mr. Kent, are you willing at this time to submit a sworn statement bearing on that particular subdivision?

47 Mr. Kent: I am not!

Mr. Johnson: Subdivision (c):

"Person, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement."

Mr. Rein: I'd just like to interject before Mr. Kent answers that. He is perfectly willing to state here why he wishes a passport and why he wishes to go abroad.

Mr. Johnson: The purpose of your recent application is—

Mr. Kent: To travel and work.

Mr. Johnson: So in summary then, you are not willing to submit a statement under oath or affirmation as to membership in the Communist Party or membership in the Communist front organizations?

Mr. Kent: No, I will not.

Mr. Johnson: Or organizations that—

Mr. Kent: I will not make such a statement under oath or out of oath!

Mr. Johnson: Mr. Kent, the Department of State
48 is willing at all times to give consideration to any information or any documentary information that you would like to submit in connection with your application for passport facilities. Pending the decision of the Department, you are at liberty to submit any information either you or your counsel wishes to submit.

Mr. Kent: The only—pardon me.

Mr. Rein: I don't know if the record is clear about the circumstances which led you to go to Moscow on your previous passport, the time of your previous trip.

Mr. Kent: If—oh, yes—

Mr. Rein: If the record isn't clear you might want to make a statement on that and perhaps you might want to make a statement as to the purposes of the passport now.

Mr. Kent: I'm very glad to make a statement.

Mr. Johnson: You may make any statement you wish, Mr. Kent.

Mr. Kent: It was referred to in, I think, my correspondence with Mrs. Shipley, my subsequent correspondence. I had no idea, in applying for my passport, of going anywhere but to France and to England originally and then it was extended to include the Scandinavian countries because I have lived there a good deal. I am familiar
49 with them and have friends there. In France I spoke before a large section of the Chamber of Deputies, urging that the French Government act against the employment of atomic weapons in warfare and toward total disarmament and the banishment of war.

Following that short address of mine, I was asked if I would accompany a delegation, an international delegation of members of various governments and others, to Moscow to lay the same proposal before the Supreme Soviet. For some reason or other, other Americans who had been expected didn't come and I immediately said, yes, I would be glad to. They said, "Give us your passport and we will get a visa." And that was done. And I went to Moscow and spoke, as of the record now, and there I was asked to accompany the delegates to Stockholm. So I got a visa. I went to the Swedish Consulate and I'm sure to the Finish Consulate. Anyhow, I got my visas to Finland and to Stockholm.

We had to stay over night at Helsinki. And in Stockholm I attended the Conference that drew up—not only attended the Conference that drew up the Stockholm Peace Appeal but was on the Board that drafted it. As I wrote Secretary Acheson, in my eagerness to go down there and explain just why, in my book of course I have shown the virtual identity of the Stockholm Appeal with the resolution passed by the Conference of Protestant Churches, or whatever it is called, and the Quakers and the Red Cross of Europe. But that is irrelevant, I guess. And then I came home.

And still innocent of having done anything, nobody asked for my passport when I came in, and then I wanted to go again because I had been elected a member of the International Jury to award peace prizes. They are prizes in a way comparable to the prizes awarded in Sweden—what are they called?

Mr. Nicholas: Nobel.

Mr. Kent: Nobel Prizes, yes. And I was invited to go there, all expenses paid, and in entire innocence I sent my passport, *my* passport, down to Mrs. Shipley and never got it back. Of course I used it, but I think probably $2.50 worth of it is still due me. That is the whole story.

Mr. Johnson: Did you use your passport on your trip to Moscow then, is that it?

Mr. Kent: Yes, oh, yes.

Mr. Nicholas: You obtained your Soviet visa in Paris?

Mr. Kent: Yes.

51 Mr. Johnson: That is your trip to Moscow in March of 1950?

Mr. Kent: Yes, and it was by way of Czechoslovakia. Whether or not I had a Czechoslovakian visa, I don't know, because it was only over night. We arrived in the evening and left early the next morning. So they may have dispensed with that. But anyhow you can check on that with the Passport Office.

Mr. Johnson: Just one concluding statement, Mr. Kent, have you any objection to the way in which this hearing was conducted here today?

Mr. Kent: Oh, no, not at all.

Mr. Johnson: How about you, Mr. Rein?

Mr. Kent: I felt there was no need—surely I wrote the book and everything is the truth in it, but it's completely irrelevant to this proceeding.

Mr. Rein: You mean so far as the manners? I think Mr. Kent has made it perfectly clear that he has no objections to the manners in this meeting. He does object to the procedure and to the basic premise behind it that you brought in those questions prerequisite to obtaining a passport. But I think that it should be perfectly clear.

Mr. Kent: If I may state my comment. It is not

52 a permission to travel. I am a grown up man; I am a citizen. I don't have to ask anybody's permission to travel. I don't concede that the Government has the right to permit me to travel or withhold permission to travel. It is a certification of my citizenship. It happens that a lot of countries require a passport. Some don't. Therefore, I may travel. The Government doesn't prevent my travel to Canada. I may travel there simply because they don't require a passport. But it is as though the State Department realized, ha, ha,—excuse me, I'm being flippant about it this way—we have the issuance of these in our power, and they are needed for that. Therefore,

we will keep them back and that does prohibit travel. It's very much as though a woman stole a man's pair of pants to keep him from going out of doors. She has no right of forbidding him to go out of doors but she can steal his pants and that does the trick. I want my pants back!

Mr. Nicholas: One point I would like to make, Mr. Kent. Mr. Johnson read you these subdivisions or subsections of 51.135 and one of them is (b). Now, there is another section, Section 51.141 (b) which modifies or explains or elaborates on Section 51.135(b). It says:

"Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts
53 and changes of that line will suffice, prima facie, to support a finding under Section 51.135(b)."

Now, in arriving at a decision as to whether a person's case falls within Section 51.135(b), it is always pertinent for a person to submit evidence that he has done something on the other side, of things that were antagonistic to the Communist Party, that showed that he did something not along the line. Now, do you wish to submit any evidence of anything that you have done which has been opposite to the Communist Party line?

Mr. Kent: I think that I could very easily think of a number of things that I have done and principles I have advocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned with whether I believed in what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant.

Mr. Rein: Let me indicate to you one point, Mr. Nicholas, without conceding the relevance of your question. I should say you have here a case which, if you want documentation of what Mr. Kent has done at any time, it is so clearly available in the public library or the Congressional Library, both in this book and other books,
54 that certainly Mr. Kent's position on everything, I don't think there is anything he has ever thought

or said that he hasn't spoken out as loud as anybody possibly can, and it doesn't require a great research job as to read this book or his previous books. If that is really the State Department's interest, we don't concede that. But I don't think Mr. Kent wants to concede that whether a position he has taken is consistent or inconsistent with the Communist Party line has any relevancy to this; he has a right to take any position he wants.

Mr. Nicholas: I want to call your attention to this and to the possibility of submitting evidence to countervail anything which may be in the Government's files to show that Mr. Kent has followed the line on various occasions. I mean, we want to give you the opportunity, Mr. Kent, to submit anything that you want which would show a deviation or opposition to the Communist Party line which would indicate that your case didn't fall within this section.

Mr. Kent: No, I don't think it's relevant. You see, this is largely a matter of principle with me, what I'm fighting for, if it has to be a fight. I wouldn't like it much better if it didn't have to be a fight. By fight, of course, I mean a court action. But my stand is that, since I am
55 an American citizen, I have never been in prison, never been convicted of a crime, though even that might not bar—I hadn't thought about it—even that might not bar a citizen from getting a passport, but because I am an American citizen I am entitled to a passport, stop.

Mr. Nicholas: Now, in connection with this same section, you referred in your book to the fact that your connection in various ways with, I think you said, 85 organizations—did you count them up?

Mr. Kent: Well, I don't know whether you know it or not, but the Attorney General's list is, with all due respect, rather silly because it includes the signing of petitions or an appeal or sponsoring of a banquet for somebody and all kinds of things like that. I don't know what they are. He says there are 85 organizations. All right, after all, what have they got the FBI for? I assume they

are efficient. In my last book I listed all I could think of and I have had some the FBI hadn't gotten. They are all listed, and in print.

Mr. Nicholas: The 85 was your count?

Mr. Kent: No, the 85 is the Attorney General's count.

Mr. Johnson: I think it's only fair to apprize Mr. Kent of the fact that we have additional information in our files which we are precluded by the Security Regulations from divulging at this hearing.

Mr. Rein: Which, I presume, you will take into consideration with addition to his book, is that it?

Mr. Johnson: That's it.

Mr. Rein: You don't think his book is enough for your purposes?

Mr. Johnson: Well, the matter of decision, of course, is not left to me.

Mr. Rein: Well, may I ask on behalf of Mr. Kent, what's the chances of getting an early decision? In other words, I do think—may I say this, I don't care whether it's on or off the record, you see.

[Off-the-record discussion]

[The interview was concluded at 3:40 p.m.]

Exhibit 10 to Hearing

State Department Information Program Information Centers

Wednesday, July 1, 1953

UNITED STATES SENATE,
SENATE PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS OF THE COMMITTEE
ON GOVERNMENT OPERATIONS,
WASHINGTON, D. C.

The subcommittee met (pursuant to S. Res. 40 agreed to January 30, 1953) at 10:30 a. m., in room 318, Senate Office Building, Senator Joseph R. McCarthy (chairman of the subcommittee) presiding.

Present: Senators Joseph R. McCarthy and Stuart Symington.

Present also: Dr. J. B. Matthews, executive director, Permanent Investigations Subcommittee; Roy Cohn, chief counsel; David Schine, chief consultant; Mrs. Ruth Young Watt, chief clerk.

Senator McCarthy. The committee will come to order.

I may say one of the reasons for calling more authors whose works have been used in the libraries is to perhaps clarify some of the confusion in regard to what the objectives of the information program are, and also to give the American people a better picture of the type of authors whose works were being used to fight communism allegedly.

Mr. Counsel, which witness do you wish to call first?

Mr. Cohn: Mr. Rockwell Kent, Mr. Chairman.

STATEMENT OF ROCKWELL KENT, ACCOMPANIED BY DAVID REIN, WASHINGTON, D. C.

Senator McCarthy. Mr. Kent, you have been sworn. You are reminded that the oath continues in effect. Just for the record, you can consult with counsel any time you care to. You can stop your testimony if and when you like and talk to counsel. If you feel you want a private conference with him, we will try to give you a private room for that.

May I make the suggestion, however, that when you have your confidential conference that you do not do it into the mikes. We have had the experience several times of counsel conferring with his client, the Senators could not hear but quite a few people on radio or television could hear what they were saying.

May I ask counsel, has it been established that considerable of the works of Mr. Kent have been purchased by the old information authorities and used in our libraries?

Mr. Cohn. I think that there are several hundred copies.

Mr. Schine. That is correct, Mr. Chairman.

Senator McCarthy. Mr. Kent, may I ask you this question, first: Is it correct that at one time you contributed some $800 to the Communist Party?

Mr. Kent. That is correct. It was in the year 1933. May I tell again the circumstances?

Senator McCarthy. Yes. I may say you may answer any question at any length you care to.

Mr. Kent. Thank you.

Senator McCarthy. Any explanation that you care to make of any answer.

Mr. Kent. I would like to make the explanation. It was money received by the rental of my home against my orders. I tried to make the tenant take the money back and live in my home as a gift. In return for that generous gesture, I got a most insulting letter. I said to myself to whom can I give this money which I did not feel to be mine. Who will be the most hateful, the greatest possible enemy of such people. I went to New York and looked up under "C" in the telephone book, Communist Party; and I counted eenie-meenie-minie-mo, whether it was the Communist Party or Communist Labor Party, and it came out Communist Party, and I sent them the $800, and stated at the time that this was money to which I felt I was not entitled. It was not my money.

Dr. Matthews. Did you go to Communist Party headquarters and personally deliver the money?

Mr. Kent. I did not.

Senator McCarthy. I might say you could have found a better charity to give it to.

Mr. Kent. Nobody who would hate such people more.

Senator McCarthy. Have you contributed other amounts of money to organizations that have been officially listed by the Attorney General as fronts for doing work for the Communist Party?

Mr. Kent. I have contributed to many such organizations. I contribute to any organization that I feel is serving a good cause.

Senator McCarthy. Do you think that the organizations that are fronts for and doing the work for the Communist Party are serving a good cause?

Mr. Kent. The fact that they are listed by the Attorney General or by anyone else as subversive does not sway me to any degree. I am a man who makes up his own mind, and if I believe that they are serving a good cause and know what that cause is, then I will join them.

Senator McCarthy. Do you think that communism is serving a good cause?

Mr. Kent. I know very little about communism. I have come to a judgment about communism. I remember reading the Martin Dies book, listing what seemed to me practically every organization in America that was in my opinion doing good work, working for the Negroes, for freedom, for the poor, for good legislation. My conclusion on finishing that book was what would America be without these so-called Communist fronts. What would it be without the Communists.

Senator McCarthy. At the time you prepared the works which the old State Department purchased, were you then a member of the Communist Party?

Mr. Kent. In answer to that question, I am going to invoke the privilege of the fifth amendment, and if you please, refuse to answer.

Senator McCarthy. You understand you can only invoke the privilege, Mr. Kent, if you feel that a truthful answer to that question might tend to incriminate you.

Mr. Kent. The answer will only be truthful if I make it. I feel that an answer might be a link in a chain of evidence that might be incriminating.

Senator McCarthy. Are you a member of the Communist Party as of today?

Mr. Kent. Should I go through this rigamarole every time? I avail myself of the fifth amendment. Is that all right?

Senator McCarthy. That is sufficient. In other words, when you say you avail yourself of the fifth amendment, we understand you to say that if you were to give a truthful answer, that answer might tend to incriminate you, and therefore you refuse to answer.

Mr. Kent. Yes, sir.

Senator McCarthy. I have no further questions.

I think that is all, Mr. Ker'. Thank you very much.

Mr. Kent. I am really going to ask the indulgence of the committee.

Senator McCarthy. Mr. Kent, may I say this, that you certainly are a very pleasant individual. Looking at you, you certainly would not be taken by the average person to be a member of the Communist Party. When you tell us that if you were to truthfully tell us whether you are a member of the Communist Party, that is the strongest indication we can get that you are a member of the Communist Party. So no matter how pleasant you may seem, I must refuse to hear any speech or any lecture from you. If you were to tell us that you were a member of the party and tell us when you joined, and why you were a member, I would not object to hearing from you. I have no objection to hearing from any member of the party who has the guts to stand up and say, "I am a Communist," and then let him preach his doctrine if he wishes. I am a strong believer, however, that where you have poison, it should be labeled poison. Where it is not poison, it should be properly labeled. So we will not hear any lecture from you unless you care to tell us whether you are a member of the party.

Mr. Kent. Lecture is the wrong word. The indulgence that I ask is that only the night before last I received the summons, and I live 300 miles north of New York, and 25 miles from the railroad station, and I got here. I am really here of my own free will, because I wanted to come before the committee and tell them what I believe. There is no signature to this. It is no more good to me than a check without a signature.

Mr. Cohn. The original, of course, was signed, Mr. Chairman. The original which was in the hands of the marshal when service was made bore the signature of the chairman. Furthermore, Mr. Kent had actual notice that he was wanted by the committee. I read a statement he made to the press in the newspapers over the weekend.

Mr. Kent. I knew I was to be called.

Senator McCarthy. May I ask one further question, Mr. Kent? Over the weekend after the papers carried the story that you were to appear here, you made a statement which was not under oath. You said it was ridiculous for anyone to assume—I am not quoting from memory—or claim you are a member of the Communist Party. I believe your statement was to the effect that you were not a member of the party.

Mr. Kent. When was this?

Senator McCarthy. Is that a correct quotation?

Mr. Kent. When?

Senator McCarthy. Let me ask you this: Did you tell the press after the notice of your subpena that you were not a member of the party?

Mr. Kent. No. The press notice that I saw in the Times, I think, the Syracuse Times-Union, was correct. I said nothing whatever. There was no question asked me, and I made no remark whether I was or was not a member of the Communist Party. I did say that I consider these book burnings as exactly paralled to the book burning in Hitler Germany, and came to the same judgment about those who are responsible for it, that the American people came to in regard to those responsible for the book burnings in Germany.

Senator McCarthy. If you did not make that statement, I beg your pardon. I understood you stated to the press you are not a member of the party. Would you think it would be improper to burn obscene filthy books that are on newsstands on the corner available to your children or your neighbor's children?

Mr. Kent. May I on the authority of a writer and painter—

Senator McCarthy. Will you try and answer that? You are talking about book burnings. I assume by book burnings you mean the removal of books from the stand; and getting rid of books. Let us forget about the Communist writers for the time being.

Mr. Kent. Yes.

Senator McCarthy. If you find filthy, obscene books on the corner newsstand—I do not know whether you have children or not, but I assume you have—and they are available to your children, would you advocate that those be removed and not be made available to youngsters?

Mr. Kent. All art is to be a crystallization and embodiment of the human beings, and they must be thought of as human beings. I would prosecute books for filthiness, lewdness—

Senator McCarthy. I did not get the first part of your sentence.

Mr. Kent. My books are the best of myself that I can put into the book. It is me. It is a living thing. I believe that all books should be looked upon as living things and treated as human beings. If they are obscene, if they advocate murder, if they advocate any violation of the law, if they advocate treason, they should be dealt with, tried, and punished, and confiscated.

Senator McCarthy. You cannot try and punish a book. Let us say that a book does advocate the things you mentioned. Let us assume it is obscene. Let us assume it advocates the violation of our laws. Would you say that book should be removed from the corner newsstand?

Mr. Kent. If found guilty by due trial.

Senator McCarthy. How can you try a book?

Mr. Kent. You can try a book. This is a committee that is virtually trying me. It amounts to that, does it not?

Senator McCarthy. We have not mistreated you, have we? We merely asked you whether you are a member of the Communist Party.

Mr. Kent. And by not answering the question, though I don't answer it to protect guilt or innocence, I feel my answer—that provision in the fifth amendment to be for the protection of the innocent as well as to shield the guilty.

Senator McCarthy. You are wrong, Mr. Kent. The provisions of the fifth amendment is to avoid forcing a man to convict himself. You perhaps know the origin of that. You are a writer.

Mr. Kent. I mentioned the origin of it in the preliminary dealing. I believe the origins was in the puritan days when they wanted to tell what they believed and could not because they would be prosecuted.

Senator McCarthy. You are wrong. The origin goes farther than that. The origin comes from old English law and practice. At the time when a criminal could go into a church, and as long as he hung on the rail, he could not be apprehended, and from that stemmed the English law which we have copied to the effect that a guilty man never need convict himself. If you were not a member of the Communist Party, then you could very simply say, "No; I am not a member." That would in no way incriminate you. So when you tell this committee, "If I were to tell the truth and tell you whether I am or am not a Communist, the truth might incriminate me," that is the same as telling this committee and the world that you are a member of the party. That cannot be used against you in a criminal case, of course. It could not even be presented to a jury, the fact that you refused to testify here. But you are here before a committee, you are under oath, you have the opportunity today if you are not a Communist to very simply say, "No; I am not a Communist." We are giving you that opportunity. You may avail yourself of it if you are not a Communist. If you are a Communist, then, of course, you should refuse to answer. Otherwise you might be prosecuted for perjury.

Mr. Kent. Senator, what you have said I understand. As I said, this committee renders a verdict of guilty for those who invoke an amendment that I believe exists—a privilege that I believe exists for the innocent as well as for the guilty.

Senator McCarthy. I thank you, Mr. Kent.

Mr. Kent. Senator, I would like to leave this statement with you.

Senator McCarthy. You certainly may.

Mr. Kent. I would like to read it, but you said you don't want a lecture. I get paid for lectures.

Senator McCarthy. I want to say if you will answer the question as to whether or not you are a Communist as of this moment, if you will say, "Yes, I am," or if you will say, "No, I am not," we will hear from you. I do not have any objection to hearing from a man who says, "I am a Communist." I am not worried about that man perverting the minds of the American people. But when you refuse to answer, I frankly will hear no more from you.

Mr. Kent. I am sorry, because I had serious charges to bring here of a conspiracy to overthrow the American Government by force and violence.

Senator McCarthy. You may step down unless you answer the question.

Mr. Kent. Thank you.

Mr. Cohn. Mr. Richard O. Boyer.

Exhibit "30"

54 In reply refer to
F130—Kent, Rockwell

Nov. 25, 1955

Dear Mr. Kent:

Reference is made to your application for a passport, concerning which an informal hearing was held at the Passport Office on November 8, 1955.

Section 51.142 of the Passport Regulations of the Department of State provides that a passport applicant may be required, as a part of his application, to subscribe under oath or affirmation to a statement with respect to present or past membership in the Communist Party.

At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955.

The Department will be glad to give further consideration to your passport application at such time as you are willing to comply with the Passport Regulations.

Sincerely yours,

FRANCES G. KNIGHT
Director, Passport Office

MR. ROCKWELL KENT,
Au Sable Forks,
New York.

Exhibit "31"

55 November 30, 1955.

John W. Sipes, Esq., Counsel,
Board of Passport Appeals,
Department of State,
Washington, D. C.

Dear Mr. Sipes:

I enclose a letter received today from the Passport Office declining the rendering of a decision in the case of Mr. Rockwell Kent.

I assume from our past correspondence in the cases of Dr. Otto Nathan and Dr. Clark Foreman and Dr. Walter Briehl that the Board of Passport Appeals will not entertain an appeal from Miss Knight's decision. In this connection I refer you specifically to your letter of September 29th, 1955 with respect to Dr. Walter Briehl.

In view of the long pendency of the proceedings in the Department with respect to Mr. Rockwell Kent and what appears to be the established policy of the Department, I shall appreciate your advising me whether I am correct in my understanding that the Board will not entertain an appeal in the case of Mr. Rockwell Kent.

Should I be in error on this point, I propose to file an appeal immediately with the Board.

In reviewing my correspondence in Dr. Briehl's case I note that three letters from me were sent before I received your response of September 29th. In view of the long pendency of Mr. Kent's case, may I request your reply by return mail, special delivery.

Sincerely yours,

LEONARD B. BOUDIN

LBB:H
Encl.

Exhibit "32"

56 December 5, 1955

Hon. John Foster Dulles
Secretary of State
Washington, D. C.

Re: Rockwell Kent

Dear Sir:

On November 30, I wrote to Mr. John W. Sipes, Counsel to the Board of Passport Appeals, as per copy enclosed. Although the need for and the possibility of a prompt response is clear from my letter, no such response has been received to date. May I therefore respectfully request that you have the proper person advise me immediately as to the answer to my inquiry?

Very truly yours,

LEONARD B. BOUDIN

LBB:J
enc.

Exhibit "33"

57 Filed Feb. 7, 1956

December 7, 1955.

Chairman,
Board of Passport Appeal,
Department of State,
Washington, D. C.

In re Rockwell Kent

Dear Sir:

I shall appreciate your response to my several requests to Mr. Sipes with respect to the appealability of the Passport Office's decision in the above matter.

May I have your reply by return mail.

Very truly yours,

LEONARD B. BOUDIN

LBB:H

61 Filed Feb. 23, 1956

Defendant's Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment

Comes now the defendant by his attorney, the United States Attorney, and moves this Honorable Court for judgment on the pleadings or in the alternative for summary judgment on the ground that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. Attached hereto and made a part hereof as Exhibit "A" is the affidavit of Frances G. Knight, Director of the Passport Office.

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62 Filed Feb. 23, 1956

Affidavit of Frances G. Knight

I, Frances G. Knight, being duly sworn, depose and say that:

(1) I am the Director of the Passport Office of the Department of State and am charged by the Secretary of State with responsibility for determining the action to be taken in the first instance on all passport applications.

(2) On June 1, 1955, the plaintiff filed a passport application stating therein, and in letters to the Passport Office (see Plaintiff's Exhibits 10 and 11), that he desired to visit England and to attend a meeting of the World Counsel of Peace to be held in Helsinki, Finland.

(3) On June 29, 1955, I notified the plaintiff in writing (see Plaintiff's Exhibit 12) that it appeared the issuance of a passport to him for travel abroad was precluded because the evidence in my possession indicated he comes within each of the categories of persons to whom passport facilities are to be refused under Section 51.135 of the Passport Regulations (22 C.F.R. 51.135), which provides:

"51.135 *Limitation on Issuance of Passports to Persons Supporting Communist Movement.* In order to promote

the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

63 "(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement."

He was also advised that he could present his case and all relevant information, either personally or in writing, to the Passport Office in accordance with Section 51.137 of the Passport Regulations, and that in either event it would be necessary for him to submit an affidavit concerning membership in the Communist Party, as provided by Section 51.142 of the Passport Regulations. A copy of the Passport Regulations is attached as Exhibit A.

(4) Thereafter, on August 2, 1955, plaintiff filed a new application for a passport wherein he stated that he de-

sires to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia for business and pleasure.

(5) On September 29, 1955, I informed plaintiff's attorney by letter (see Plaintiff's Exhibit 20) that the informal hearing procedure specified in Regulations Section 51.137 was still open to him if he desired to explain away or deny any of the matters noted in my letter of June 29, 1955, tentatively refusing passport facilities to plaintiff.

(6) On October 27, 1955, the plaintiff's attorney advised me by letter that plaintiff "has taken the posi-
64 tion that the Passport Office's demand for an affidavit under Section 51.142 of the regulations is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand." (See Plaintiff's Exhibit 23.)

(7) On November 8, 1955, plaintiff, with counsel, appeared for an informal hearing in the Passport Office, during which plaintiff again was asked to submit an affidavit in accordance with Section 51.142, but he refused. Plaintiff also refused: "to consider the allegations" in my letter of June 29, 1955; "to submit a sworn statement" as to whether or not he is under the direction, domination, or control of the Communist movement"; and he refused to submit any evidence to show that he has done anything in opposition to the Communist Party line. Passport Office Transcript of Proceedings, In the Matter of Rockwell Kent, November 8, 1955, pp. 29, 46-47, 50, 53 (see Plaintiff's Exhibit 24).

(8) Accordingly, on November 25, 1955, I informed plaintiff by letter (see Plaintiff's Exhibit 30) that there would be no further proceedings with respect to his application until he fully complied with the Passport Regulations.

(9) On December 14, 1955, plaintiff still not having complied with the Passport Regulations filed suit to compell the issuance of a passport and for other relief.

(10) To date plaintiff has not submitted the required affidavit nor explained away any of the matters set forth in my letter to him, June 29, 1955.

(11) I deem it necessary to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present the past membership in the Communist Party because of information set forth in (a) government publications, news reports and other public sources; (b) records of the Department of State and confidential
65 reports from its officers in foreign countries; and (c) confidential reports from another agency of the Government; which information compelled me to conclude that the plaintiff has manifested a consistent and prolonged adherence to the Communist Party line on a variety of issues through shifts and changes of that line.

(12) The information obtained from public sources shows:

(a) That during the past 20 years plaintiff, who admits that until then he "was not a joiner", has been a consistent supporter of Communist organizations—at least 85, according to Congressional Committee reports—as evidenced by his support, for example, of the following 23 organizations, all cited by the Attorney General as "Communist" pursuant to Executive Order 9835: president of the International Workers Order; national committeeman of the American League for Peace and Democracy; national committeeman of the North American Committee To Aid Spanish Democracy; national committeeman of the International Labor Defense; sponsor of the United American Spanish Aid Committee; sponsor of the Schappes Defense Committee; sponsor of the American Committee for Protection of Foreign Born; sponsor of the

National Federation for Constitutional Liberties; master of ceremonies for a 1940 meeting of the American Peace Mobilization; participated in the efforts of the Abraham Lincoln School (Chicago, Illinois); sponsor of the tenth annual convention of the National Negro Congress; affiliation with the League of American Writers and the National Committee for the Defense of Political Prisoners; sponsor of the American Committee for Spanish Freedom; sponsor of Council for Pan-American Democracy; sponsor of Council for a Democratic Far Eastern Policy; sponsor of National Council of American Soviet Friendship; sponsor of American Committee for Yugoslav Relief, Inc.; sponsor of a 1947 Banquet of the American Slav
66 Congress; affiliated with the Joint-Anti-Fascist Refugee Committee and the Friends of the Soviet Union; aided and urged participation in the Civil Rights Congress; and a charter member of the Peoples' Radio Foundation, Inc.

(b) That in 1951 plaintiff was an initial sponsor of; and has since urged others to participate in; the American Peace Crusade, an organization designated by the Attorney General pursuant to Executive Order 10450 after it had failed to take advantage of the hearing procedures.

(c) That plaintiff has otherwise demonstrated his affinity for Communist organizations in that he was national chairman of the National Committee for People's Rights, described in 1940 as "an auxiliary of the Communist Party" by a former member of the Central Executive Board, Communist Party of Kansas when he testified before a congressional committee; that plaintiff was a sponsor of, and otherwise active on behalf of, the Scientific and Cultural Conference for World Peace, held in New York City in March 1949, which organization the then Secretary of State described as a "sounding board for Communist propaganda"; and that, as more fully detailed in my letter of June 29, 1955, plaintiff has been

affiliated with numerous other organizations described as Communist-fronts by one or more legislative committees.

(d) That plaintiff's activities have induced others to conclude as follows: Benjamin Gitlow, a former vice presidential candidate on the Communist Party ticket, told a congressional committee in 1939 that plaintiff 67 was one of the national committee board members of the International Labor Defense "who are Communists"; Maurice Malkin, a former Communist Party member, also told a congressional committee in 1939 that, if plaintiff is not a Communist Party member, he is "very close to them"; Dr. Goodwin Watson while testifying before a congressional committee in 1943, concerning his knowledge about Communist activities, said: "I think he [plaintiff] is pretty well lined up with the Communists"; plaintiff was "one of the so-called leaders of the Communist Party", according to testimony of special investigator for the Dies Committee, 1940-41; Directors of Carnegie Library refused to permit American League for Peace and Democracy to use its facilities for special meeting to honor plaintiff in 1939 because they believed plaintiff to be a Communist; plaintiff spoke at American Labor Party meeting in 1948, all the work for which meeting was done by Communists, a former Communist Party member told a congressional committee in 1953; and in 1949 Dr. Matthews, the then Director of Research for the House Committee on Un-American Activities, referred to plaintiff as a Communist Party member.

(e) That plaintiff has been active in programs supporting nationally known individual Communist Party members, as evidence by plaintiff being national chairman of the Professional Groups for Browder and Ford in 1936; sponsor of Mother Bloor Birthday Banquets, particularly those in 1936, 1937 and 1947; signer of an open letter in 1942 on behalf of Harry Bridges; signer of open letter in 1940 calling for release of Sam D'Arcy, then chairman of

Communist Party in Pennsylvania; signer of a 1947 statement on behalf of Gerhardt Eisler; publicly supporting Communist Party congressional candidate Leo Isacson; activity on behalf of Eugene Dennis and George Dimitrov; a signer of an open letter supporting the Hollywood writers who refused to answer questions before a congressional committee about their associations with the Communist Party; and the other similar activities
68 noted in my letter of June 29, 1955.

(f) That plaintiff, when in 1953 he was called to testify before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, refused to answer questions, solely on the ground that the answers would tend to incriminate him, about whether or not he was a Communist Party member.

(g) That plaintiff by his statements, both oral and written, has demonstrated that he accepts Communist Party propaganda, as for example, plaintiff's 1936 article in the "New Masses" (June 23, 1936 issue) which concluded that

"to be a true American a man must have the will to right our social wrongs. How is his concern. For me the way is Communism."

and his speech of March 7, 1950, before the Soviet Committee in Defense of Peace wherein, he said, *inter alia* that

"As a member of this peace delegation and a fighter for peace, I must tell you that I am not an official representative of the American Government. I must also say, in respect to my own integrity, that the American Government is not representative of me."

and at a press conference in Moscow the following day, plaintiff stated that anti-Soviet slander is fostered by the United States Government so as to instill in the Ameri-

can people hostile feelings toward Soviet people, and, further, that he told reporters on August 18, 1950, at his home that:

"I am interested in the peace movement because it is backed by Communists. Anything that the Communists say about peace sounds good to me."

(h) That in March 1950, plaintiff went to Moscow as a member of a "peace" delegation even though his passport was not valid for travel there and that plaintiff presumably was aware that passports were not being validated for that particular trip because the "peace" delegation announced a unanimous resolution protesting what it said was this Government's ban on the "peace" delegation's trip abroad.

(i) And that plaintiff has otherwise been active
69 in Communist sponsored programs and events, as indicated in my letter to him, June 29, 1955.

(13) The Department's records and reports from its diplomatic and consular officers abroad, show, *inter alia*:

(a) That plaintiff was a member of the "National Committee to Defend Dr. W.E.B. Dubois and Associates in the Peace Information Center" under whose auspices a message was despatched in 1951 to the World Federation of Trade Unions, where in it was stated that "today everyone appearing before an American Court of Law as a political prisoner has to accept a sentence."

(b) That during a March 1950 speech in Sweden plaintiff again stated that the United States Government did not represent him or his views; that the American people were confused by the propaganda put forth by the American press and radio; and that this is all attributable to the "revolver men" in power in Washington.

(c) That during a March 1950 press interview in Denmark plaintiff said that the United States looks with dis-

favor upon peace partisans like himself because the United States manufactures arms to hold back depression and, therefore, dislikes talk about peace.

(d) That in 1948 plaintiff was invited by the Communist Women's International Democratic Federation to be a member of the International Committee of Honor to preside over the organization's exposition in Paris, 1948.

(e) That while plaintiff was in Helsinki, Finland, March 1950, he visited the Soviet Embassy there but not the Embassy of the United States.

(14) Confidential reports from another agency of the Government show *inter alia*, that plaintiff often attended special Communist Party meetings in Chicago, Illinois.

70 In view of the aforenoted information, I still deem it necessary for plaintiff to execute the requested affidavit before I can further process his application for a passport.

FRANCES KNIGHT
Frances G. Knight

Opinion of the Court

The Court: (McGarraghy, J.) I am prepared to rule, to express my view on the case. In my opinion the passport regulations in question are valid and reasonable regulations.

Further, in my opinion the plaintiff is not entitled to relief because he fails first to show he has exhausted his administrative remedies, and, second, because he fails to qualify for a passport in that he has failed to make the non-Communist affidavit which the valid regulations require, and therefore I will deny the motion for a preliminary injunction and will deny the plaintiff's motion for summary judgment and grant the Government's motion for summary judgment.

74 Filed Mar. 29, 1956

Order

Upon consideration of plaintiff's motions for preliminary injunction and for summary judgment, and of defendant's cross-motion for summary judgment, and it appearing to the Court that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this 29th day of March, 1956,

ORDERED, That the defendant's cross-motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED, That the plaintiff's motion for preliminary injunction be and the same hereby is denied, and it is

FURTHER ORDERED, That the complaint herein be and the same hereby is dismissed.

JOSEPH C. McGARRAGHY
Judge

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75 Filed Mar. 30, 1956

Notice of Appeal

Notice is hereby given this 30th day of March, 1956, that the plaintiff, Rockwell Kent, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of March, 1956, in favor of the defendant, John Foster Dulles, against said plaintiff.

[fol. 87] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13297

ROCKWELL KENT, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

OPINION—Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

PRETTYMAN, *Circuit Judge*: Rockwell Kent is an artist. On August 2, 1955, he filed with the Department of State an application for a passport to travel to Europe to paint pictures. He stated he desired to visit England, Ireland, [fol. 88] France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia, the stated purpose being "prosecution of profession and pleasure". The Director of the Passport Office wrote him under date of September 29, 1955, referring to the action of the Department upon a prior application. Upon receipt of that prior

application, executed June 1, 1955, the Department had written him that it was obliged to disapprove the request tentatively, on the ground that the grant was precluded under Section 51.135 of the Department's Passport Regulations.[1] The letter of the Department continued, "In your case it has been alleged that you were a Communist." Thereafter the letter contained a long (four printed pages in the joint appendix before us) recital of affiliations with Communist-front organizations, espousals of the Communist cause, and participation in Communist activities. He was advised that he would be required, as a prerequisite to a hearing on his application, to submit a sworn statement as to whether he was then or ever had been a Communist.

On October 27, 1955, counsel for Mr. Kent wrote the Department that his client had taken the position that the demand for an affidavit was unlawful and that he would not respond to such demand. However, on November 8, 1955, an informal hearing was held in the Passport Office, at which hearing Mr. Kent appeared with counsel. In the course of the hearing the Department put certain evidence in the record, principally a copy of Mr. Kent's book, *It's Me O Lord*, an autobiography. Mr. Kent conceded that anything in the book is accurate. Portions of the book were read into the record. In the course of that hearing Mr. Kent was asked a question directed at each subdivision of Section 51.135 of the Passport Regulations. He was asked whether he would submit a sworn statement [fol. 89] as to whether he was or was not a member of the Communist Party, a sworn statement bearing on subsection (b) of the regulation, or a sworn statement as to membership in Communist-front organizations. He refused to submit any such sworn statement. He summarized his position thus: "* * * because I am an American citizen I am entitled to a passport, stop."

On November 25, 1955, the Director of the Passport Office wrote Mr. Kent, referring to his declining to furnish a statement respecting his then-present or past membership in the Communist Party, his alleged affiliation with

[1] 17 FED. REG. 8013 (1952), 22 C.F.R. §51.135 (Supp. 1955).

Communist-front organizations, and other alleged Communist activities. The letter concluded:

> "The Department will be glad to give further consideration to your passport application at such time as you are willing to comply with the Passport Regulations."

Mr. Kent thereupon filed in the District Court a complaint for declaratory judgment and injunction. The Secretary answered. The plaintiff then moved for preliminary injunction and for summary judgment, and the Secretary moved for judgment on the pleadings or for summary judgment. In a brief opinion the District Court held that the passport regulations are valid and reasonable. It denied the plaintiff's motions and granted the Secretary's motion for summary judgment. This appeal followed.

It is stated to us by both the appellant and the appellee that the issues in this case are identical with the issues in *Briehl* v. *Dulles*,[2] decided by this court today. The members of the court vote in this case as they voted in that one and adhere to the opinions filed by them in that case. Accordingly Judges Prettyman, Wilbur K. Miller, Washington, Danaher and Bastian vote to affirm. Chief Judge Edgerton and Judge Bazelon vote to reverse. Judge Fahy [fol. 90] votes to reverse and to remand for further proceedings before the Secretary consistently with the views set forth in his opinion in *Briehl*.

Affirmed.

BURGER, *Circuit Judge*, took no part in the consideration or decision of this case.

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[2] —— U.S. App. D.C. ——, —— F.2d ——.

[fol. 91] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

C.A. 5411-55

No. 13,297

ROCKWELL KENT, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT—June 27, 1957

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

Per Circuit Judge Prettyman.

Circuit Judges Prettyman, Wilbur K. Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Judge Fahy votes to reverse and to remand for further proceedings before the Secretary of State consistently with the views set forth in his opinion in No. 13,317, *Briehl* v. *Dulles*.

Circuit Judge Burger took no part in the consideration or decision of this case.

[fol. 95] Clerk's Certificate to foregoing transcript omitted in printing.

PAGE

Complaint 100
Answer 104
Plaintiff's Motion for Summary Judgment 107
Motion for Preliminary Injunction 107
Affidavit of Walter Briehl 108
Exhibit 1 to Briehl Affidavit 117
Exhibit 2 to Briehl Affidavit 118
Exhibit 3 to Briehl Affidavit 120
Exhibit 4 to Briehl Affidavit 122
Exhibit 5 to Briehl Affidavit 123
Exhibit 6 to Briehl Affidavit 124
Exhibit 7 to Briehl Affidavit 125
Exhibit 8 to Briehl Affidavit 126
Exhibit 9 to Briehl Affidavit 127
Exhibit 10 to Briehl Affidavit 150
Exhibit 11 to Briehl Affidavit 156
Exhibit 12 to Briehl Affidavit 157
Exhibit 13 to Briehl Affidavit 158
Exhibit 14 to Briehl Affidavit 159
Exhibit 15 to Briehl Affidavit 160
Exhibit 16 to Briehl Affidavit 161
Exhibit 17 to Briehl Affidavit 161
Exhibit 18 to Briehl Affidavit 162
Defendant's Cross-Motion for Summary Judgment 163
Affidavit of Frances G. Knight 163
Exhibit B to Knight Affidavit 166
Proceedings in District Court 168
Opinion of the Court 169
Order 170
Notice of Appeal 170
Proceedings in U.S.C.A. for the District of Columbia Circuit 171
Opinion, Prettyman, J. 172
Concurring opinion in the result, Washington, J. 199
Dissenting opinion, Bazelon, J. 204
Dissenting opinion, Edgerton, C.J. 240
Dissenting opinion; Fahy, J. 241
Judgment 247
Clerk's certificate (omitted in printing) 251
Order allowing certiorari 253

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,317

WALTER BRIEHL, *Appellant*,

v.

JOHN FOSTER DULLES, Secretary of State, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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9 Filed Nov. 16, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5042-'55

DR. WALTER BRIEHL, 2060 North Vine Street, Los Angeles, California, *Plaintiff*,

v.

JOHN FOSTER DULLES, Secretary of State, Department of State, Washington, D. C.; *Defendant*.

Complaint for Declaratory Judgment and Injunction

The plaintiff, Walter Briehl by his attorneys, complaining of the defendant, John Foster Dulles, Secretary of State, alleges as follows:

1. The Court has jurisdiction of this action under D. C. Code Sections 11-305 and 11-306; under Section 10 of the Administrative Procedure Act, Title 5 U. S. Code section 1009; and under Title 28 U. S. Code, section 2201.

2. The defendant, John Foster Dulles, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

3. The plaintiff is a citizen of the United States, residing in Los Angeles, California. He is a practicing psychiatrist and a member of various national and international psychiatric and pyschoanalytic societies.

4. In connection with his profession, plaintiff finds it necessary to attend international meetings dealing with the subject matter of his profession.

5. In May 1953 the plaintiff applied for and obtained a passport for the purpose of attending international conferences, and used this passport in order to attend
10 an International Pyschoanalytic meeting in London and a meeting of the World Federation of Health

at Vienna. Upon his return from these meetings he reported on these proceedings to his local societies in Los Angeles.

6. Plaintiff at all times used the said passport in accordance with the laws, regulations and orders relating thereto, and in compliance with the terms and conditions set forth in the said passport.

7. Upon the expiration of this passport, the appellant in April 1955 applied for a renewal of the passport. He stated in his application for renewal that he wished this passport for the purpose of attending international conferences abroad, specifically, an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. These were the same congresses which plaintiff has previously attended and had reported back to his local societies in Los Angeles.

8. Subsequently on May 31, 1955 the defendant acting through his subordinate, the Director of the Passport Office, wrote to the plaintiff stating that his application for renewal of a passport was tentatively rejected under the provisions of Section 51.135 of Title 22 of the Code of Federal regulations. The letter stated that this denial of the application was based upon allegations in the files of the State Department that the plaintiff had been a member of the Communist Party and had allegedly had associations with alleged Communist organizations.

9. The plaintiff replied asking for an evidentiary hearing in which he might be confronted with the evidence, if any, upon which the decision of the State Department had been based. Subsequently, the plaintiff appeared at the Passport Office for a hearing. At this hearing, the plaintiff demanded that he be confronted with the evidence upon which the State Department based its action. The State Department refused to comply with this request maintaining that the sole purpose of the hearing was to give officials of the State Department an opportunity to

11 question the plaintiff concerning his lawful political beliefs and associations. The plaintiff, nevertheless, insisted upon his right to be confronted with the evidence against him and refused to submit himself to such an inquisition.

10. Thereafter on September 16, 1955 the Director of the Passport Office informed the plaintiff that she would take no action on his application for renewal because of the plaintiff's refusal to submit himself to an inquisition into his political beliefs and associations in the absence of being confronted with the evidence, if any, upon which the State Department relied.

11. Plaintiff duly filed an appeal with the Board of Passport Appeals. The plaintiff was advised that since the Passport Office had not formally denied the plaintiff a passport but had merely stated that it would refuse to act on his application, under the appropriate regulations, no appeal would be taken to the Board of Passport Appeals.

12. The action of the defendant in this case is unlawful in that:

a. Plaintiff as an American citizen has a right under the First, Fifth, Ninth and Tenth Amendments to travel outside of the United States.

b. The statutes authorizing the Secretary of State to issue passports do not authorize him to impose political conditions upon the issuance of passports. The regulations issued by the Secretary of State are not authorized by statute and are on their face arbitrary and illegal in that they impose political conditions upon travel in violation of applicable statutes and the First and Fifth Amendments of the Constitution.

c. Due process of law requires that before an individual be denied the right of travel he must be accorded a hearing at which he will have the opportunity to be confronted with the evidence against him.

12 d. There is no authority in the statute authorizing the issuance of passports for the imposition of a test oath as a condition precedent to consideration of an application for a passport; and the imposition of such a condition is in violation of the First and Fifth Amendments.

13. The plaintiff has exhausted his administrative remedies.

14. The actions of the defendant in denying the plaintiff a renewal of his passport and refusing to consider his application for renewal have interfered with plaintiff's rights of travel, free speech, association and livelihood and are causing the plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment

a. Decreeing that the plaintiff, as an American citizen, is entitled to a passport under the statutes of the United States, including the Passport Act of 1926.

b. Decreeing that the passport regulations of the Secretary of State are invalid and illegal and are in violation of the statutes of the United States, including the Passport Act of 1926, the Constitution of the United States and the Universal Declaration of Human Rights of the United Nations.

c. Decreeing that the defendant's refusal to renew the plaintiff's passport are in violation of the plaintiff's rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations.

d. Enjoining the defendant from continuing to deny a passport to the plaintiff.

e. Directing the defendant to renew plaintiff's passport.

f. And for such other and further relief as may be just and proper.

14 Filed Jan. 17, 1956

Answer

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the complaint.

THIRD DEFENSE

Plaintiff has failed to comply with the passport regulations and consequently is ineligible for a passport.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

FIFTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the complaint, defendant avers:

1. Defendant asserts that inasmuch as the allegations contained in the first paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant denies the allegations contained in the second paragraph of the complaint except that defendant admits that he is Secretary of State of the United States and that as Secretary of State, he alone is authorized to grant and issue, or refuse to grant and issue passports, under such rules as the President designates.

15 3. Defendant admits that plaintiff is a citizen of the United States residing in Los Angeles, Cali-

fornia. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint.

5. Defendant admits that in May, 1953 the plaintiff applied for and obtained a passport. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6 of the complaint.

7. The allegations contained in paragraph 7 of the complaint are admitted except that defendant avers he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 7 of the complaint.

8. In answer to the allegations contained in paragraph 8 of the complaint, defendant avers that on May 13, 1955 plaintiff was asked to furnish the Department of State with an affidavit as to whether he had ever been or was a member of the Communist Party. Thereafter, on May 20, 1955, plaintiff responded to the Department of State's request and refused to furnish said affidavit. Thereafter on May 31, the defendant, acting through his subordinate, the Director of the Passport office, wrote to the plaintiff stating that his application for renewal of the passport was tentatively rejected under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. The letter stated that the denial of the application for a passport was based upon the following allegations: "Specifically, it is alleged that you were a member of the Los Angeles County Communist Party; that you were a mem-

ber of the Book Shop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1951 you contributed articles to the Communist publication "Social Work Today"; that in 1939, 1940, and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade and calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress Bail Fund, to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Inc."

9. Denied. Further answering, defendant avers that the plaintiff was thereafter given an informal hearing before the Passport Office of the Department of State, at which time the plaintiff refused to file an affidavit and refused to give any testimony whatsoever relating to the allegations against him contained hereinabove.

10. Denied. Further answering, defendant avers that the Director of the Passport Office stated there was no further action which could be appropriately taken by the Department of State in view of the fact that plaintiff refused to explain or deny the allegations against him contained in the letter tentatively denying his passport application.

11. Defendant admits that plaintiff filed an appeal with the Board of Passport Appeals. Further answering, defendant avers that plaintiff was advised that the Board of Passport Appeals was established to act on appeals and decisions adverse to a passport applicant and since plaintiff had refused to comply with the regulations, the Board of Passport Appeals had no authority to act.

12. The allegations contained in paragraph 12 of the complaint state conclusions of law and therefore do not require answer but if answer be required, defendant denies the allegations contained therein.

13. Denied.

14. The allegations contained in paragraph 14 of the complaint state conclusions of law and therefore do not require answer but if answer be required defendant denies the allegations contained therein.

WHEREFORE, defendant having fully answered the allegations contained in the numbered paragraphs of the complaint, demands judgment together with costs of this suit.

Filed Feb. 1, 1956

Plaintiff's Motion for Summary Judgment

Now comes the plaintiff by his attorneys and, pursuant to Rule 56 of the Federal Rules of Civil Procedure moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion plaintiff refers to the entire record herein, including the pleadings and the affidavit of the plaintiff.

Filed Feb. 1, 1956

Motion for Preliminary Injunction

Plaintiff, by his attorneys, moves the Court for a preliminary injunction enjoining, pending the disposition of this action, the defendant, his officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with him from denying a passport to plaintiff, and directing the defendant to issue a passport

to the plaintiff for use during the pendency of this action.

The grounds of this motion are that unless so enjoined the defendant's action will cause the plaintiff irreparable injury before this cause can be disposed of.

In support of this motion plaintiff refers to the pleadings herein and to the affidavit filed by the plaintiff.

(Filed Feb. 1, 1956)

Affidavit of Walter Briehl

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

Walter Briehl, being duly sworn, deposes and says:

1. I am plaintiff in the above entitled suit. I make this affidavit in support of the motion for summary judgment and the motion for a preliminary injunction which have been filed herein on my behalf.

2. I have read the complaint filed in this action and know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.

3. I obtained my licence to practice medicine in the State of New York in September, 1930, and I engaged in the practice of medicine as a licensed Doctor of Medicine, specializing in psychiatry, from 1930 to 1942 in the State of New York. From 1930 to 1931 I was assistant psychiatrist at the Mental Hygiene Clinic of Mt. Sinai Hospital in New York City. From 1931 to 1934 I was resident alienist at Bellevue Psychiatric Hospital, New York City. From 1934 to 1936 I was chief of the Mental Hygiene Clinic at Lebanon Hospital, Bronx, New York; from 1936 to 1946 I was Associate Attending Psyciatrist at Vanderbilt Clinic, Medical Center, New York City, and during the period, Associate, Department of Psychiatry, College of Physicians and Surgeons, Columbia University, New York City.

4. From 1942 to 1946 I was on military leave from the last mentioned appointments and positions. During my forty-two months of military service I held successively, the ranks of Major and Lieutenant Colonel. I served as Chief Psychiatrist at the Army Air Force Regional Hospital, Scott Field, Bellville, Illinois, and A.A.F. Station Hospital, Boca Raton, Florida. My military rating was "superior".

5. In 1946, following my separation from military service, I was licensed to practice in the state of California, and I have been engaged in the practice of psychiatry in this state continuously since 1946.

6. I am a member or fellow of the following professional societies:

American Medical Association
Los Angeles County Medical Association
California Medical Association
Fellow of the American Psyciatric Association
Fellow of the New York Academy of Medicine
Society for Psychiatric Medicine of Southern California
American Psychoanalytic Association
International Psychoanalytic Association
Los Angeles Psychiatric Society
Diplomate of the American Board of Psychiatry and Neurology
Southern California Psychiatric Society.

7. In the spring of 1953, I and my wife, who is a trained psychologist, applied for passports to attend meetings of the International Psychoanalytic Congress and of the World Federation for Mental Health, which in that year were being held in London and Vienna respectively. My wife and I obtained passports for that purpose in 1953. We attended the meetings mentioned, and we reported on the proceedings at those meetings to our professional societies in Los Angeles.

8. Our passports were scheduled to expire in May of 1955. In April, 1955, my wife and I filed passport renewal appli-

cation forms, sending along our 1953 passports. Approximately four weeks after our 1955 renewal applications we received letters dated May 13, 1955, from the State Department stating that our requests were being considered "under the provisions of the 'Supplement to Passport Regulations.'" The letter to me, a copy of which is annexed hereto as Exhibit 1, further stated:

> "In this connection, it would be helpful to the
> 22 Department "if you furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connection with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of Foreign Born. Your affidavit should set forth your connection with any other Communist front organization with which you may have been associated."

9. The State Department's letter of May 13, 1955, to my wife contained a request for "an affidavit setting forth whether you are now or ever have been a Communist," and her "connection with the People's Educational Center and the California Labor School."

10. Upon receiving the aforementioned letters of May 13, 1955, from the State Department, my wife and I consulted an attorney, Daniel G. Marshall, Esq., of Los Angeles, California. Under date of May 20, 1955, Mr. Marshall wrote to the State Department a letter (annexed hereto as Exhibit 2) advising that my wife and I were unwilling to submit the affidavits requested, our refusal being based on several constitutional grounds. Mr. Marshall's letter set forth also the facts regarding the scientific purpose and importance of our proposed trip—which was, as in 1953, to attend meetings of the professional societies earlier mentioned, the 1955 meetings being scheduled to take place in Geneva and in Istanbul. Mr. Marshall's letter stated:

> "Attendance at such International conferences has as its purpose the free interchange of professional informa-

tion and opinion and is a necessary part of the maintenance of their [my wife's and my] high professional standards in the practice and teaching of psychiatry, psychoanalysis and mental hygiene. Interference with their right to attend such conferences is an unwarranted invasion of the traditional relationship between patients and practitioners of "the healing arts. Obviously, these purposes promote the national interests of this country and have no rational connection with 'security considerations.'"

11. Further, Mr. Marshall specifically called the State Department's attention to the fact that my wife and I were scheduled to depart from New York on June 26, 1955, on a specific airline flight. Mr. Marshall's letter set forth also a brief resume of my and my wife's professional background and concluded:

> "Demand is hereby made that passports as applied for by them should be issued forthwith. Kindly telegraph collect your disposition of this demand."

12. The State Department did not send the requested telegraphic reply or otherwise answer Mr. Marshall. On May 31, 1955, it wrote me a letter, annexed hereto as Exhibit 3, stating that it was "obligated" to disapprove our requests for passports "on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations." It added:

> ". . . it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its mem-

bers; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom "Stage, Incorporated.

24 "Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

"If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist."

The Department's letter of the same date to my wife essentially reiterated the Department's allegations of May 13th.

13. Under date of June 9, 1955, my attorney, Mr. Marshall, wrote to the State Department, stating in part that my wife and I "do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter stated have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country." (The above-mentioned letter is annexed hereto as Exhibit 4.)

14. Some three weeks after the last-mentioned letter from Mr. Marshall to the State Department, no reply having been received, Mr. Marshall again wrote to the Department on June 29, 1955, calling attention to the then just rendered court decision in the case involving the

passport application of Dr. Otto Nathan. Mr. Marshall requested the State Department to grant an evidentiary hearing of the type required in the *Nathan* case, for the purpose of establishing the facts which led to the Department's tentative disapproval of my passport application, as advised in the Department's letter of May 31, 1955, mentioned above, (Mr. Marshall's letter of June 29, 1955, is annexed hereto as Exhibit 5.)

25 15. The State Department continued to do nothing. Mr. Marshall waited another three weeks and then, on July 20, 1955, he again wrote to the State Department renewing his previous demands on my behalf (Letter of July 20, 1955, annexed hereto as Exhibit 6.) In the said letter Mr. Marshall informed the Department that I had been appointed as Delegate of the American Psychoanalytic Association to the World Federation of Mental Health at Istanbul from August 21 to August 26, 1955. He called attention to the fact that the State Department was ignoring our repeated letter demands, and he protested against the irreparable damage which Department was doing to me "professionally and personally." Mr. Marshall's aforementioned letter of July 20, 1955, crossed in the mail with a letter to him from the State Department dated July 19, 1955, which stated:

> "You are informed that if Dr. and Mrs. Brield desire the Department to give further consideration to their cases, they should proceed in accordance with the procedures outlined in the Passport Regulations."

16. Mr. Marshall promptly replied on July 25, 1955, demanding a hearing at Los Angeles (See Exhibit 7 annexed hereto). The Department, abiding by its seemingly standard lag of three weeks before answering passport correspondence, wrote to Mr. Marshall under date of August 17, 1955, stating that I and my wife would be given "an informal hearing of the nature outlined in Section 51.137 of the Passport Regulations", at Washington, on August 30, 1955. (Exhibit 8, annexed hereto).

17. A so-called hearing in my case was accordingly held on August 30, 1955, at Washington, D. C. (Copies of the stenographic transcript and of an article referred to therein are annexed hereto as Exhibits 9 and 10 respectively). The hearing was of an informal nature. Present with me at the hearing was Leonard B. Boudin, Esq., whom I had engaged as co-counsel with Mr. Marshall.

18. The State Department's representative at the hearing, Mr. Ashley Nicholas, Deputy Director of the Passport Office, who was accompanied by another departmental official, Mr. Frans Mathes, repeatedly asked me whether I would make a non-Communist affidavit of the type above described. I and my attorney repeatedly stated that the State Department ought to present evidence in support of its allegations or suspicions concerning my alleged affiliations, and that the witnesses or informers in the case ought to be brought forward so that I might confront them. My reasons, as a scientist and professional man, for desiring a passport were set forth in detail. My standing and background as a scientist and professional man were likewise set forth in detail. Both my attorney and I repeatedly requested Mr. Nicholas, alternatively (1) to approve the granting of a passport to me forthwith on the basis of my contention that I was lawfully entitled thereto and that the Department's objections or conditions were unlawful; or (2) to produce forthwith or reasonably promptly the evidence, if any, supporting the State Department's allegations against me; or (3) to make a decision forthwith or with reasonable promptness wherein the State Department should declare or rule as a matter of official action and record that it had finally determined to refuse me a passport.

26

19. The last mentioned request, i.e., the request for a final decision refusing me a passport, was repeatedly explained to and urged upon Mr. Nicholas by my attorney and by me as essential for the purpose of laying the groundwork for an appeal to the State Department's Board of

Passport Appeals. Mr. Nicholas' rulings upon the record regarding my alternative requests were as follows: (1) My demand for the immediate issuance of a passport was not granted. (2) I was not to have an evidentiary hearing. (3) But at the same time I was not to have a clear, definite or final ruling, such as would entitle me (according to the State Department's procedures) to carry the matter before the Board of Passport Appeals. Mr. Nicholas' only apparent reason for this utterly hamstringing set of rulings was that the State Department was unwilling or unable to process my matter any further so long as I adhered to my declination to submit an affidavit relating to the charges of political or other organizational affiliations or activities which the State Department, without disclosed
27 proof or particulars of any kind, was making.

20. Immediately upon the conclusion of the said so-called hearing on August 30, 1955, my attorney, Mr. Boudin, telephoned John W. Sipes, Esq., the counsel of the Board of Passport Appeals, requesting a review of Mr. Nicholas' rulings. Mr. Sipes suggested to Mr. Boudin that the said request be confirmed in writing, which Mr. Boudin did under date of August 31, 1955. (Exhibit 11, annexed hereto). Mr. Boudin also wrote to Mr. Nicholas the same day, requesting that Mr. Nicholas render a decision within a few days, so that the matter might become ripe for consideration by the Board of Passport Appeals, (Exhibit 12, annexed hereto).

21. By letter of September 2, 1955, Mr. Sipes advised Mr. Boudin that the Board of Passport Appeals "could not entertain an appeal . . . at this time." (Exhibit 13, annexed hereto).

22. On September 12, 1955, Mr. Boudin wrote again to Mr. Nicholas inquiring as to the status of the matter and requesting Mr. Nicholas to telephone immediately collect. The latter request was ignored by the State Department.

but under date of September 16, 1955, the Director of the Passport Office, Miss Frances G. Knight, wrote Mr. Boudin that because of my refusal to "explain or deny the allegations" or to submit a non-Communist affidavit, "the Department knows of no further action which it can appropriately take in the case of Dr. Briehl." (See Exhibit 14, annexed hereto).

23. The above letter from Miss Knight explicitly speaks for "the Department", thus indicating that it was intended by the Department of State to indicate that its action in my case was final at all levels of the Department—namely, a refusal to do anything whatsoever about my passport application because I was refusing to give the Department the requested affidavit about my political beliefs and associations.

24. Even though Miss Knight's letter of September 16, 1955, appeared to be intended as the final word on the subject by the State Department as a whole, my attorney, Mr. Boudin, made final efforts to explore the avenue
28 of appeal to the Board of Passport Appeals, requesting to be advised whether the Board would entertain an appeal where the Passport Office took the position that it would simply refuse to render a decision because of the passport applicant's refusal to execute the requested affidavits. (Exhibits 15, 16 and 17, annexed hereto). Mr. Sipe replied under date of September 29, 1955, stating that the Board of Passport Appeals acted on appeals from "decisions adverse to the Passport applicant" and that "the Board is unaware of such an adverse decision in Dr. Briehl's case." (Exhibit 17 annexed hereto.)

25. The same professional reasons for travel that existed in 1955 prevail today. The Freud Psychoanalytical Centennial will be held in London on May 6th, 7th and 8th, 1956. The World Federation for Mental Health will be held in Munich the B. J. M. N.P. in August, 1956. I wish to attend at least one and possibly both of these confer-

ences. I cannot do so unless the defendant renews and returns my 1953 passport to me.

WALTER BRIEHL
Walter Briehl

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29 **Exhibit 1**

DEPARTMENT OF STATE
WASHINGTON

Filed Feb. 1, 1956

May 13, 1955

In reply refer to
F139, Briehl, Walter

Dr. Walter Briehl
2060 North Vine Street
Los Angeles 28, California

Dear Dr. Briehl:

The Department has received your recent request for the renewal of passport No. 107673, which was issued to you on May 6, 1953.

You are informed that your request is being considered under the provisions of the Supplement to Passport Regulations, copy of which is enclosed. In this connection, it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences, and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. Your affidavit should

set forth your connection with any other Communist front organizations with which you may have been associated.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Enclosure:
Supplement to Passport Regulations

Exhibit 2

Filed Feb. 1, 1956

DANIEL G. MARSHALL
Attorney at Law
786 Occidental Life Building
1151 South Broadway
Los Angeles 15, California
Richmond 7-9392

May 20, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your Reference:
F 130—Briehl, Walter
130—Briehl, Marie Hurwitz

Dear Sir:

Dr. Walter Briehl and his wife, Marie Hurwitz Briehl, 2060 North Vine Street, Los Angeles 28, California, have referred to me for answer your letter to them of May 13, 1955.

My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments.

My clients planned their trip abroad to attend scientific conferences of the International Psychoanalytic Congress in Geneva and the World Mental Health Congress in Istanbul. Attendance at such International conference has as it purpose the free interchange of professional information and opinion and is a necessary part of the maintenance of their high professional standards in the practice and teaching of psychiatry, psychoanalysis and mental hygiene, interference with their right to attend such conference is an unwarranted invasion of the traditional relationship between patients and practitioners of the healing arts.

Obviously, these purposes promote the national interests of this country and have no rational connection with "security consideration."

My clients have incurred expense and will incur substantial financial loss in the event passports are refused them for their scheduled departure from New York on June 26, via KLM.

Dr. Briehl served three and one-half years as a Major and Lieutenant Colonel in the United States Air Force Medical Corps. His professional memberships include International Psychoanalytic Association, The American Psychoanalytic Association, and Society for Psychoanalytic Medicine of Southern California. He holds fellowships in the New York Academy of Medicine and the American Psychiatric Association.

Mrs. Briehl is a child psychoanalyst of long and varied experience.

Demand is hereby made that passports as applied for by them be issued forthwith.

Kindly telegraph collect your disposition of this demand.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM
Enclosure: Copy this letter

AIRMAIL

31 **Exhibit 3**

Filed Feb. 1, 1956

May 31, 1955

In reply refer to
F130—Briehl, Walter

Dr. Walter Briehl
2060 North Vine Street
Los Angeles 28, California

Dear Dr. Briehl:

The Department has received a letter dated May 26, 1955 from your attorney in which he states that you decline to furnish the Department with the affidavit which was requested in the Department's letter to you dated May 13, 1955.

I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to

raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Profection of Foreign Born and a contact of the Freedom Stage, Incorporated.

Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

32 You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concern-

ing the reasons why he was denied a passport or enter the Department's action in this case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State.

FRANCIS G. KNIGHT
Director, Passport Office

33

Exhibit 4

Filed Feb. 1, 1956

June 9, 1955

The Secretary of State
Washington 25, D. C.

Attention: Francis G. Knight, Director, Passport Office

Your Reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

My clients above named have referred to me for letter to them of May 31st.

They wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country.

The demand to be confronted with these informers is without prejudice to their objections to Title 22, Chapter

, Part 51, of the Code of Federal Regulations, as stated
n my letter to you of May 20, 1955.

Yours very truly,

DANIEL G. MARSHALL.

DGM:JM

Exhibit 5

34

Filed Feb. 1, 1956

June 29, 1955

Secretary of State
Washington 25, D. C.

Re:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

In view of the decision in the case involving the passport application of Dr. Otto Nathan, my clients, above named, demand an evidentiary hearing or to be confronted with the evidence, if any, which lead to the tentative disapproval of the application of my clients for renewal of passport facilities, of which disapproval you advised under date of May 31, 1955.

In view of the fact that my clients will suffer irreparable and substantial damages in the event of your continued refusal to renew their passport facilities, said hearing is demanded within 15 days from the date hereof.

This demand is made without prejudice to the rights of my clients as stated in my letter to you of May 26, 1955.

Kindly acknowledge receipt of this letter on the enclosed copy.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM
airmail-special delivery
cc: Dr. and Mrs. Walter Briehl

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35 **Exhibit 6**

Filed Feb. 1, 1956

July 20, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

My client, Dr. Walter Briehl, has been advised that he has been appointed a delegate of the American Psychoanalatic Society to the World Federation of Mental Health at Istanbul from August 21 to August 26, 1955.

Under date of June 29 the writer repeated the demand of Dr. Briehl and his wife, Marie Hurwitz Briehl, for issuance to them of passport facilities. No reply has been received.

This demand is hereby repeated. Your refusal to issue promptly the requested passport facilities seriously and

irreparably damages my clients, professionally and personally.

Please acknowledge receipt of this letter.

Very truly yours,

DANIEL G. MARSHALL

DGM:JM
Airmail
Special Delivery

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36 **Exhibit 7**

Filed Feb. 1, 1956

July 25, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

This will acknowledge receipt of your letter of July 19th, replying to my letter of June 29th. Under date of July 20th the demand of my clients for passport facilities was repeated, without reply, however, from you.

In view of the tentative disapproval by you under date of May 31st, my clients are now entitled to appear in person before a hearing officer of the Passport Division under Section 51.137 of Title 22 of the Code of Federal Regulations, as that provision has been construed in the Nathan, Foreman, Schachtman and Kamen decisions.

All previous demands of my clients, contained in my earlier correspondence with your office, are hereby re-

peated, particularly, but not limited to, the demands for a hearing at Los Angeles forthwith.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM.
Airmail

P.S. Please note the change of address of the writer since my last letter.

DGM

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37 **Exhibit 8**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

Aug. 17, 1955

In reply refer to
F 130—Briehl, Walter
F 130—Briehl, Marie Hurwitz
Mr. Daniel G. Marshall
Attorney at Law
4041 Maritan Avenue
Los Angeles 8, California

Dear Mr. Marshall:

The Department has received your letter of July 25, 1955 with further reference to the passport case of Walter Briehl and Marie Hurwitz Briehl.

You are informed that the Department is prepared to accord Mr. and Mrs. Briehl, at Washington, on Tuesday, August 30, 1955 an informal hearing of the nature outlined in section 51.137 of the Passport Regulations.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

38 **Exhibit 9**

TRANSCRIPT OF INFORMAL HEARING IN PASSPORT OFFICE

39 Filed Feb. 1, 1956

This will be a record of an informal hearing as provided in Section 51.137 of the Passport Regulations. Present are Dr. Walter Briehl and his attorney, Mr. Boudin, and for the State Department, Mr. Nicholas and Mr. Franzmathes.

Mr. Nicholas: Dr. Briehl, this is the hearing as provided in Section 51.137 of the Passport Regulations and it is for the purpose of affording you an opportunity to either deny or to explain the allegations set forth in the Department's tentative refusal letter to you dated May 31, 1955. You received the letter, did you?

Dr. Briehl: Which one? Yes, I believe I received a letter from you, I don't recall the date but it was certainly a letter of allegations.

Mr. Nicholas: Are there any questions you wish to ask about the contents of the letter?

Dr. Briehl: I am represented by my attorney, Mr. Boudin, and I will request him to answer in respect to these allegations.

Mr. Boudin: Mr. Nicholas, in the Spring of 1953, Dr. and Mrs. Briehl applied for passports to attend the meeting of the International Psychoanalytic Society at London, England, and the World Federation of Mental Health in Vienna. They obtained passports and attended those meetings and reported on the transactions at those meetings to their societies in Los Angeles. I am, of
40 course, referring to their professional societies. These passports expired in May of 1955. On April, 1955, Dr. and Mrs. Briehl filed renewal application forms which with the expired passports were sent to Washington.

It was not until about four weeks later that they received letters from the Passport Office stating that passports would not be issued on Security grounds and circumstances contrary to the national welfare. May I see a copy of those letters, if you will? Mr. Nicholas hands Mr. Boudin the passport renewal application of Dr. Briehl.

I am now looking at the passport renewal application of Dr. Briehl which indicates that the renewal fee was received by the Passport Office in Washington on April 13, 1955. It also appears from the application that Dr. Briehl stated that he wished to depart from New York on July 3, 1955 for two months by KLM to visit the countries of Ireland, England, Switzerland, France, Germany, Austria, Turkey, Italy, and Greece. It also appears from the application that the purpose of the trip was "International Psychoanalytic Congress—Geneva, and World Mental Health Organization Congress—Istanbul. The letter which was sent by the Department, to which I referred, was referred to Dr. Briehl's attorney, Mr. Daniel Marshall of California, who I understand wrote a letter of protest and a demand for the passports forthwith. I should appreciate seeing a copy of that letter.

Mr. Nicholas points out the letter: I have just examined
41 the letter which is dated June 9, 1955 and sent from California by Mr. Marshall to the Secretary of State—Attention of the Director of the Passport Office. Now this letter states the following:

"My clients, above named, have referred to me for answer your letter to them of May 31st. They wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they had been, are or intend to engage in acts contrary to the national interest of this country.

"They demand to be confronted with these informers without prejudice to their objections to Title 22, Chapter

1, Part 51 of the Code of Federal Regulations as stated in my letter to you of May 20, 1955."

Oh, I see, you have given me, Mr. Nicholas, the second letter sent by Mr. Marshall not the first to which I referred. (Mr. Nicholas hands him the letter of May 20, 1955). Yes, I have now seen Mr. Marshall's letter of May 20, 1955 to the Secretary of State in which he states among other things:

"My clients planned their trip abroad to attend scientific conferences of the International Psychoanalytic Congress in Vienna and the World Mental Health Con-
42 gress in Istanbul. Attendances such as the national conferences has as it's purpose the free interchange of professional information and opinion and is a necessary part of the maintenance of their high professional standards in the practice teaching of psychiatry, psychoanalysis, and mental hygiene. Interference with their right to attend such conferences is an unwarranted invasion of the traditional relationship between patients and practitioners of the healing arts.

"Obviously these purposes promote the national interests of this country and have no rational connections with "Security Consideration". The letter adds—a relevant part—"My clients have incurred expense and will incur substantial financial loss in the event passports are refused them for their scheduled departure from New York on June 26, 1955 via KLM.

"Mr. Briehl served three and one-half years as a Major and Lieutenant-Colonel in the United States Air Force Medical Corps. His professional memberships include the International Psychoanalytic Association, The American Psychoanalytic Association, and The Society for Phychoanalytic Medicine of Southern California. He holds fellowships in the New York Academy of Medicine and the American Psychiatric Association."

43 And the letter concludes, after other statements with the following:

whether he is a delegate or not, although in this particular case Dr. Briehl was, of course, a delegate of an important and honorable association in this country. Our first point, therefore, is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to participate in conferences by injecting this issue of
politics in connection with his travel abroad. When
46 a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliations, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. Now you know, or you should know, if your files are complete, that Dr. Briehl has a long and honorable record in the field of medicine. I will just indicate here so that you can have it for your records, a brief resume of some of the points in his medical history. He took pre-medical studies at Columbia University from 1920 to 1923; He attended a school of medicine at the University of Vienna in Austria from 1924 to 1930 securing his degree of medicine in June 1930; He was licensed in New York State on September 1930 and practiced psychiatry in New York from 1930 to 1942; He was an assistant phychiatrist at Mount Sinai Hospital in New York City from 1930 to 1931; He was resident alienist at Bellevue Psychiatric Hospital in New York City from 1931 to 1934; He was chief of the Mental Hygiene Clinic, Lebanon Hospital, Bronx, New York from 1934 to 1936; He was associate attending phychiatrist at Vanderbilt Clinic and associate in phychiatry at College of Physicians and Surgeons, New York City, from 1936 to 1946; He was on military leave from 1942 to 1946; He served 42 months as a Major and Lieutenant-Colonel; Was Chief Psychiatrist of the Army Air Force Regional Hospital at Scott Field, Bellville, Illinois. He had a superior military rating and in 1946 he was licensed in California and has practiced
psychiatry in California since 1946. Your records
47 should also show, if they do not, that he is a member of the Society for Psychoanalytic medicine in

Southern California; He is a member of the American Psychoanalytic Association, the International Psychoanalytic Association, the Los Angeles Psychiatric Society and he is also a fellow of the American Psychiatric Association and a fellow of the New York Academy of Medicine In addition, he is a diplomat of the American Board of Psychiatric and Neurology. Now, under those circumstances, knowing these facts as you must have known them—and certainly knowing some of them by correspondence, it was the duty of the Department, in our view, to give Dr. Briehl a passport which he sought and the failure of the Department to give him that passport was not only wrong but we think unlawful. The damage which has been caused him, you already know, by his failure to attend the conferences and the delays which are indicated here in the correspondence with the Department are equally and unfortunately a part of a pattern which I have previously discussed with the Department and which apparently continues to be in effect. We are looking not only to the past but to the future. Dr. Briehl will be attending medical conferences in Europe next year. Similar conferences are held annually. He, will undoubtedly, attend them as a delegate. He will, also, of necessity in connection with attending those conferences want to travel in Europe for pleasure and for educational work due to his profession. For these reasons we are now appearing here not only to re-
48 request the renewal of the passports and to call the attention of the Department to the wrong which they did him but to be sure that this does not occur again so that he can make arrangements to go to Europe next year without any feeling of having to go through these expensive negotiations with the Department, Departmental conferences, and hearings again. Now I turn, now, to the second point but only briefly because it isn't necessary for us to rely upon it—the point I make is on behalf of Dr. Briehl. It is our position that, of course, every American citizen has the right to travel regardless of politics.

We don't think that members of a single profession are the only ones who are entitled to travel and, of course, in discussing my first point I was merely emphasizing the legitimate function which he was carrying out rather than to argue that membership in the profession gave one a particular right to travel. My second point is that everyone has the right to travel regardless of political considerations. The reservations made by Mr. Marshall with respect to the legality of the Regulations I, of course, reaffirm and we do not in appearing here agree that the Regulations are either completely or substantively agreed to or accepted as valid under the laws of the United States or the Constitution of the United States. Now we turn to the third point. You have made certain allegations against Dr. Briehl and we have requested by letter, the letter being that of Mr. Marshall specifically, that you confront us with the evidence against Dr. Briehl.

49

Now the reason for this is as follows: it is our judgment that the Department has followed a practice of charging a person with membership in the Communist Party not on the basis of evidence in its files, not even on the basis of evidence not disclosed to us, but that this is a generalized conclusion which the Department throws in on the basis of a pattern of conduct of which it disapproves and which it decides to put in as a final, what we would call in the vernacular, killer-diller and this has been, I am persuaded of this fact, by my experience in the cases of Dr. Nathan and Dr. Forman where the Department quite improperly and untruthfully and incorrectly charged membership in the Communist Party, and thereafter, in the course of litigation gave passports to both of these persons who were clients of mine. Both of these persons made affidavits, Dr. Forman and Dr. Nathan, stating that they had never been members of the Communist Party and, of course, the Department disregarded those affidavits in the long proceedings before it. We think that the time has come for the Department to support allegations of

this general nature and of this seriousness and that before it makes accusations of this kind in future cases that it is up to the Department to be satisfied that the accusations are truthful in its own view. It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. In the particular case we are satisfied that this Department will never, can never and doesn't intend to, and in fact that there is no evidence, which would support an allegation as to membership in the Communist Party as far as Dr. Briehl is concerned. But we do not propose, very frankly, to subject ourselves to an interrogation concerning political views and associations and to give the Department a substitute, because that is what it is seeking here, a substitute for its burden of proving allegations of this character. In other words, we think that if the Department truthfully thinks, and I don't think it thinks so, that it has any evidence to support the allegation that Dr. Briehl is a member or was a member of the Communist Party, it is the duty of the Department to produce that evidence here through witnesses and we will subject those witnesses to cross-examination. Now I am, of course, quite candidly satisfied that there are no witnesses. These are not facts, the Department isn't prepared to prove it and the Department is relying upon this concept of security in making a charge which it is not required, in its view, and, of course, not able to factually prove. But, our position is that the time has now come after a series of these cases in which charges of Communist Party membership have been made for the Department to put-up or shut-up frankly in this area and we take the position, very firmly, both as a matter of improving the behavior of Governmental Departments and, specifically, the Passport Office and, secondly, on a basis of considerations of process which seem very important to us and, we think to the courts that the Department cannot make allegations of this kind unless it has somewhere evidence to support

the allegation. These loose accusations have to stop and this is the point at which we are going to stop them and so, we now say to you that we want you to produce today or tomorrow, although it was your duty to produce them today, the witnesses upon which you rely if they exist which we deny, to support these allegations of membership in the Communist Party and, if you cannot, tell me, now that you cannot and admit that you cannot support those allegations, then it is your duty as Government officials to withdraw those charges. As far as the other charges are concerned we think there, too, it is your duty to prove each one of these points and we will expect you to withdraw these allegations today and all of them unless you are prepared to prove them. And we have a very practical problem involved more specifically with respect to these allegations. We think that allegations of this kind have no meaning unless the Department is prepared to prove not only the facts but wherein the acts charged are wrong. In short, where the Department charges, for example, that someone signed a petition for the Abraham Lincoln Brigade, it would be up to the Department to prove not only the fact of the signing of the petition in accordance with our theory of an accusatorial system of law in which the Government proved allegations of alleged wrong doings but it is up to the Department to prove why that was wrong if it can prove the facts. The right of petition for example, is guaranteed in certain respects by the Constitution of the United States. If the Department is referring to something that is covered by the right of petition under the first amendment then obviously the Department is not making a charge of wrongdoing cognizable anywhere or the right of petition may not be within the technical petition provision of the first amendment but may be an example of the right of free speech which is being exercised. In short that, and I am merely taking that as an example, is what I regard as the duty of the Department in all of these cases and a duty

52

that we intend to do whatever we can to compel the Department to adhere to. Now it may ultimately turn out that the Department will find itself confronted with the fact that all of the wrongful acts charged against people in passport cases, not only against Dr. Briehl, are acts which are perfectly lawful and in fact constitutionally protected such as the right of association or the right to put up bail or the right to be a member of an organization or the right to take out books and even the right to read books may be constitutionally protected but that is the Department's problem and it may point up the fact that substantively the Department's Regulations are unconstitutional as we have alleged. We are now discussing, however, the procedural problem and I want to emphasize that . . . that we have a right to what the courts have now called a quasijudicial hearing, although we called it by other technical terms in litigation in the Nathan-
53 case, and that it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States. This is the duty which the Department has today and which I am confident it is not prepared to sustain today or any other day. Now perhaps since I have discussed this matter after talking to Dr. Briehl about it, he would like to add something before I raise one other problem.

Dr. Briehl: I think my attorney, Mr. Boudin, has stated my case. Of course, I, as a litigant in the matter, am very much interested in this matter of allegations and I certainly would like to know the nature of this whole matter and in this respect I would like to ask Mr. Nicholas a question. What article did I write in this so-called Communist publication? Do you wish to answer that, Mr. Nicholas?

Mr. Nicholas: I assume the article you refer to is that one which appeared in Social Work Today. We do not appear to have a text of the article.

Dr. Briehl: That is Mr. Nicholas, acknowledges that he has not read the article and has not seen it. On what basis then does he draw up an allegation then when he is totally unfamiliar with the content of this allegation? May I also ask him whether he has read Social Work Today so that he might use his own judgment as to the nature of my Article?

54 Mr. Nicholas: I do not read the particular magazine and the Department's evaluation of it is based on information from another agency of the Government which is better qualified than I.

Dr. Briehl: Inasmuch as Mr. Nicholas is an authorized representative of the Passport Office before he makes an allegation of this kind against my professional integrity in denying me a passport to go to a medical meeting, I think it is his solemn duty to familiarize himself with these proceedings before he asks me to make an affidavit to deny any of these statements with which he is unfamiliar. In this same vein I am motivated to proceed with many of the other allegations which Mr. Nicholas has stated in his letters. As I believe in fundamental truths I think that this can be best established not by an affidavit but by permitting me and my attorney to be confronted with those who have made these allegations. I think this is the basic fact and I have asked in my interview with Mr. Nicholas on August 17th, that he cooperate with me. I clearly informed him at that time that representatives were misinforming him about these allegations. He simply reiterated the problem over and over again. Do you wish to make a statement denying that you are a Communist? I felt that this was basically irrelevant to the issue.

Mr. Boudin: Now this is our problem. We are here today to request the immediate renewal of the passports. Dr. Briehl will not be in the East more than an addi-

55 tional week, he is going back to California to resume his practice of medicine having a date now on the eve of the completion of his vacation in the East. We

should like to have a decision from the Passport Office today. You have had this file since April of 1955. It has now heard our formal position, heard our objections to procedures and to the regulations, it has heard our demands for the production of evidence and it would seem to me that the Department is either unwilling or unable to make the attempt to produce such evidence. Under these circumstances we have a right to the immediate issuance of the passports—that is the immediate renewal of the passports. Since the applications for these renewals have been in effect since April of 1955. Obviously, we want the renewals to be granted so that we are not again put in the position that we were in the months of April to date. Therefore, our request today is for the issuance of these passport renewals today. In the event that the Department is going to decide this case against us we request that the decision be made immediately and we should like the Passport Office to arrange for the immediate hearing of this case before the Board of Passport Appeals. The reasons for the immediate hearing are those which I've indicated before that the length of time that has elapsed since the filing of the applications for renewals, the gaps that have existed between the letters sent by or on behalf of Dr. Briehl and the Passport Office's responses—I won't go into the chronology at the moment—and finally
56 the fact that he must go back to California. I should like him to be present at the hearing before the Board of Passport Appeals even though that isn't required by the Regulations. It will still be desirable for him to be present so that he can present his case with the Board of Passport Appeals in the event that the Passport Office decides the case against us. I am aware of the fact that technically under the Regulations the Board of Passport Appeals is a different body but in my experience with the Board of Passport Appeals and my discussions with the Chairman or its counsel it is perfectly clear that it is part of the same office and that it regards itself

as being on a coordinate level, not technically in the sense of being a body superior to the Passport Office. Just to clarify that I may say that when at one time this office refused to render a final decision in the case of Dr. Otto Nathan, I met with the Chairman of the Board of Passport Appeals or Counsel and asked them to hear the appeal regardless of the refusal of this office to make a final decision and they told me that they were not an appellate body but only a coordinate level of a coordinate body and in that sense were not really an appellate body. The fact that you are all one group of officers in the Department of State, I am directing my requests to you, Mr. Nicholas, and ask that you make arrangements today before we leave for the Board to hear this matter, if we are to be denied the pasport renewal, and we will be prepared to stay on today and undoubtedly the Board can be convened
57 immediately since it consists of Departmental officers and is in my experience an ad hoc group which is no formal Board but a number of people assigned to the Board for particular cases. My request to you, Sir, now is as follows: We should like the passport renewals granted immediately. If they are not to be granted immediately, then we request that you give us your decision immediately. If the decision is going to be adverse to us, though I trust that it will not in view of the absence of evidence to support the Department's decision, then I should appreciate your calling immediately while I am here to the Chairman of the Board of Passport Appeals or Counsel and have this matter set down for argument since I am in Washington today with Dr. Briehl and it will be preferable that we hear the case today, of course. However, as I say, Dr. Briehl will be leaving the East the day after Labor Day and if it were absolutely necessary we could come back here tomorrow or the day after that for the purpose of appearing before the Board of Passport Appeals . . . excuse me a second.

Dr. Briehl: Mr. Nicholas, to the best of my knowledge and belief, I was giving the spirit and the sense of our interview. No human being is infallible and, if you wish to make any corrections on my remarks will you please do se . . . I am ready to be corrected if in any way I have misinterpreted or not understood the sense of your comments in our interview.

58 Mr. Nicholas: As far as I recall your comments were along the lines of our discussion. I don't remember the exact words and I assume you don't either. Do I understand that it is your position, Dr. Briehl that you will not file an affidavit of the nature outlined in Section 51.142 of the Passport Regulations?

Dr. Briehl: That is correct, Mr. Nicholas, for the reasons that my attorney has given. I gave further reasons in my interview, namely, there is some doubt in my mind whether the filing of the affidavit would not at a future date on some basis subject me to perjury. I take this position because from the nature of the allegations. I have some questions about the impartiality of the Passport Department in adequately evaluating my affidavit. These are some of the reasons why on this occasion, I must refuse the request that in order to obtain a passport to these Medical conferences that I give an affidavit.

Mr. Boudin: Let me just clarify one point as an attorney because I have discussed these problems with Dr. Briehl. As I say I've discussed these problems with Dr. Briehl and his very distinguished counsel, Mr. Daniel Marshall of California. Dr. Briehl was, of course, referring to a feeling which we have had which is that in inquiries of this kind, the use of the attest oath generally, whether by the Passport Office or elsewhere, is not an attempt to elicit a fact, not an attempt to elicit the truth, but a species of entrapment, an attempt by Governmental Agencies

59 in many cases to have something which they might conceivably hold over the heads of American citizens. Dr. Briehl was, of course, referring as I know from our

discussions to an unfounded prosecution for perjury such as I am convinced have occurred in a number of cases in this country in recent years. If your sources of information are accurate and, of course, in many cases they appear not to be, you will, of course, know of your own knowledge that Dr. Briehl isn't and never has been a member of the Communist Party. I have made this statement with respect to other clients of mine, namely, that if your security reports have any validity and any accuracy these facts are known to you, must be known to you or the people giving these reports. That, however . . . that, by the way, was the case with Dr. Nathan wohm you charged with being a member of the Communist Party and the case of Dr. Forman against whom you made a similar charge. The fact that you are not seeking information or facts and are not seeking the truth is indicated, I think, by the procedure followed by the Department in those other cases where if you had been seeking a fact you would have accepted the affidavit under oath made by the applicants for passports and, yet, except in the cases of litigation where court orders have either been issued or were on the eve of being issued, I know of no political case where a man who has been charged with membership in the Communist Party has filed an affidavit that he has never been a member of the Communist Party and yet received a passport unless he went to Court. Now I don't have all of the passport cases obviously in this Department but I have a pretty wide knowledge even of those which I don't have and I have made a study of the problem and I think that my statement is accurate, if I'm not, of course, I can be corrected but I'm sure the correction will be a minor deviation and my statement, in general, will stand. So our basic position is . . . that there is no real interest in relating the facts when the Department asks for such an affidavit; secondly, it does provide a species of pressure and coercion upon the conduct of the citizen in the future because anybody who signs one of these affidavits has to watch his con-

duct very carefully in the future in view of what the Department apparently consists to be Communist activities but the fundamental objection. I just wanted this to be perfectly clear, because it is the objection which I certainly raise at the instance of my various clients and which I raise here is, that if ours is an accusatorial system, then the Government must prove its charges and cannot substitute for proof, which is lacking, this kind of interrogation of an American citizen and so our answer is that for all of the reasons which have been given as well as the basic Constitutional objections to an attest oath which would apply in all areas and which would be stronger necessarily in the field of passports where we are dealing with a right not a privilege as a Court of Appeals has once said for all of these reasons we will not give you an affidavit of the kind requested.

61 Dr. Briehl: I bring this point up because it was brought up in my interview with Mr. Nicholas and it is a question which is unanswered. Unless I have clarification on the method of logic and on the method of reasoning I do not see how I can proceed with the affidavit matter. The specific question which I asked of Mr. Nicholas and I would like an answer from him is this. Inasmuch as several of the allegations antedated 1942 when I was commissioned as a Major, why was I commissioned a Major and subsequently promoted to Lieutenant Colonel if any of these allegations had any significance? On what basis am I during war time as a commissioned officer entrusted with confidential and restricted and classified information and then in peacetime when as a physician I wish to go to a medical conference I am regarded as a security risk and my visit abroad on a medical mission for the welfare of mentally sick people, the mental hygiene problem being the most important problem in America at the present time, am I considered a security risk? Do you wish to answer that question Mr. Nicholas? Can you clarify me as to your sense of values on this point?

Mr. Nicholas: You have asked questions entirely outside the jurisdiction of the Passport Office and I will not attempt to answer them. Should I assume from your statements and the statement by Mr. Boudin that you will not make any statement at the present time either under oath
62 or otherwise as to whether or not you were ever a member of the Communist Party?

Dr. Briehl: Mr. Nicholas you avoid basic truths and though you tell me in your Regulations that you would consider any statement I make when I make a statement that has direct reference to this point you simply tell me "you have not complied with regulations". I do not think this is a fair method of procedure at all. I stand on fundamental facts and you must consider the problem in its entirety. You cannot just stick to one point. You must see the total situation and evaluate things in their proper perspective. You have repeatedly avoided these questions when I have put the questions to you point blank. Now would you give me an answer on this point? What is your method of reasoning? I must understand that because I'm a sensible, intelligent person.

Mr. Nicholas: Dr. Briehl, I am afraid you are avoiding the question yourself and I must assume that you will not answer the question I ask you. Mr. Boudin will you state on the record whether Dr. Briehl will state whether he was, or is now, a member of the Communist Party?

Mr. Boudin: The application for a passport renewal states under oath the reasons for Dr. Briehl's application for the passport renewal and the reasons for his desire to travel abroad. I assume that it is not necessary to state under oath that the same reasons will apply to the year 1956 when similar conventions will be held and that it is essential in his view in the practice of his medicine that he be able to travel to Europe freely without the
63 restrictions imposed by the Regulations. Now, it is our basic view that the practice of medicine must not be confused with political considerations and that there

is one premise here which we accept and which apparently you do not namely, that national security cannot be imperiled and that it could not have been the intention of Congress or the President or even the Secretary of State in enunciating these Regulations to impose political conditions upon a physician who desires to travel to Europe for the purpose stated under oath in the application for a passport and which purposes still remain with respect to the next year. In short, it is inconceivable, logically, factually, morally or legally, that national security should be adversely affected by Dr. Briehl's going to Europe to attend these conventions. On the contrary it is highly consistent with and, in our view, necessary for national security in a larger sense and every other sense that Dr. Briehl and other physicians engaged in this important work of mental health, which is one of the most important things for this country and for the world, that Dr. Briehl be permitted to attend these conventions where he is qualified to appear and to teach people and to learn and to which he has been sent by the most important professional organizations in this country. That is why the only affidavit that you are entitled to is the affidavit which is set forth in the passport application. The only thing under oath that you are entitled to is a passport application or an application for renewal which states why Dr. Briehl wants to go to Europe. If you had any facts to show that his statement was in any respect untrue, and, of course, you do not . . . I assume then it would be up to you to present these facts here but that, as I say, is the only statement under oath to which you are entitled in this situation. Under these circumstances I now come to the answer which I thought we had given you several times before . . . Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to

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any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal. Have I answered your question clearly?

Mr. Nicholas: Yes. This is the answer I have been trying to get out of Dr. Briehl . . . that he will not make such an affidavit.

Dr. Briehl: If it is a matter of an affidavit, I will give an affidavit truthfully as to why I am going to Europe.
65 I will substantiate my passport application that I intend to attend medical conferences, that I intend to travel and to see some relatives. That is the sum and substance complete of my purpose and that encompasses my whole point of view. I am willing to attest to that fact. That is the only point that is relevant in relation to my trip.

Mr. Boudin: Mr. Nicholas, we have answered you several times. I think we answered you earlier at the beginning of the hearing when we discussed the whole procedural due process point but at any rate I think you are in agreement.

Mr. Nicholas: I think the record is very clear now on the subject. I just want to advise you that the Department does give weight to affidavits which people submit as to past and present membership in the Communist Party and has issued a number of passports to people on the basis of such affidavits. These cases, of course, don't go to Court and do not come to the attention of Mr. Boudin.

Mr. Boudin: Mr. Nicholas, now you have several requests before you which we have made and perhaps I can put them again. The first is our request for the issuance of a passport now. Can you give us an answer on that?

Mr. Nicholas: I cannot give you an answer at this time.

Mr. Boudin: Mr. Nicholas, I want to have it clear for the record what your responses are to our request. First,
66 you've indicated that we can't have a decision today. Will you tell me when we can have a decision and by whom that decision is going to be made? I refer to your

reference a few minutes ago for the record that a number of other people inside the Department would have to be consulted, so that I could know from a legal point of view and also from a practical point of view where we are going. Would you indicate who it is who is going to make the decision in this case, who will do the consulting, who will be consulted and when we can have a decision.

Dr. Briehl: May I plead with Mr. Nicholas on the basis of my being a physician and I must be back with my patients that this whole matter be expedited. I am of limited time and of means and I hope that he will make every effort in his behalf to give us a decision on this point.

Mr. Nicholas: We will be glad to give you a decision as soon as possible. Certain things are outside of the control of the Passport Office and I can only estimate at the time involved. If the final decision which will go from the Passport Office is adverse, you will then have to take up with the Counsel of the Board of Passport Appeals the date for the hearing. That is entirely outside the jurisdiction of the Passport Office. The Board functions as a part of the State Department under the chairmanship of an Assistant Secretary of State who otherwise has nothing to do with passport matters. I can only suggest that when the final decision of the Passport Office is received, if it is adverse, you have your attorney to get in touch with Mr. Sipes who is Counsel for the Board.

Mr. Boudin: Could you tell us when we'll have a decision from your office.

Mr. Nicholas: No, I cannot tell you at the present time.

Mr. Boudin: Now you have made a reference to the right to appeal to the Board of Passport Appeals, that is you have made that reference on the record but, of course, as we have discussed off the record here and in fairness to both of us, I want to point out this problem that may arise. Section 51.142 points out that at any stage the applicant may be required as a part of his application to subscribe under oath or affirmation to a statement with respect to present or past membership in the Communist Party. See-

tion 51.156 provides it is required that prior to petitioning for an appeal an applicant shall (1) exhaust the administrative remedies available in the Passport Office as set forth in 51.137 and (2) comply with the provisions of 51.142 as a part of his application if deemed necessary by the Passport Office. Now, from a practical point of view you have previously requested, and I presume that was because you in your judgment deemed it necessary although I haven't agreed with that, of course, that Dr. Briehl execute an affidavit. We have stated precisely and unambiguously that we will not execute that affidavit or any other kind of attest oath. This means realistically doesn't it, taking 51.156 and 51.142 that the Board will not entertain any appeal any more than it was willing to do originally in the case of Dr. Nathan where we did not have what this Passport Office called a final decision. In short, I want to ascertain realistically where we go after this Passport Office makes it's decision. Am I not correct?

Mr. Nicholas: This is a matter you had better take up with the Counsel of the Board of Passport Appeals. Section 51.156 is a Regulation of the Board with which the Passport Office has nothing to do. I do not know whether the Board has ever waived the particular regulation and suggest that you get in touch with Mr. Sipes in regard to that matter.

Mr. Bondin: Now just to make it clear, since I do not regard the Passport situation in the Department particularly clear in the light of the decisions when the lines of jurisdiction between one office and another in the Department respecting passports are quite vague. I now state for this record that I request you, Mr. Nicholas, as a representative of the State Department and the Passport Area to make a decision on this case immediately and to make arrangements with the Board of Passport Appeals or the Secretary of State or anybody else in the Department for the immediate hearing of an appeal from your decision, if it is adverse, and by "immediate", I mean not later than this week-end. We are prepared to be here

today, tomorrow, Friday and Saturday but the important thing is to have this case heard by the Board of Pass-
69 port Appeals before Dr. Briehl leaves and he will be leaving right after Labor Day for California. Now I am aware of the fact that you pointed out to us . . . I think on the record . . . that technically it is not necessary for Dr. Briehl to be present. On the other hand we have a right to have him present if we wish to in the hearing of the appeal and it would be my present intention to have him present so that he can state to the Board what his full position is on the subject. I feel that . . . you are the recognized authority in the security field in the Department with whom I have now been dealing for two and one-half years and I, therefore, must request you as a representative of the Department to give us a decision in this matter this week . . . and, of course, a decision in our favor . . . alternatively, if the decision is to be against us, then I want you to make the arrangements for a hearing before the Board of Passport Appeals this week and that is my final request to you, Sir.

Mr. Nicholas: Mr. Boudin, you are asking for something entirely beyond my authority.

Mr. Boudin: Then in order to facilitate the problem of an appeal in view of what I have just read, namely 51.142 and 51.156, I request the Passport Office to withdraw its request for an affidavit of any kind on the part of Dr. Briehl and in that way avoid the problems that may be raised by the Board of Passport Appeals. Since I'm interested in expedition I don't want to find that after your have rendered a decision here, if it is adverse, that
70 we file a petition for appeal with the Board of Passport Appeals and find that it won't hear it. I want this matter cleared and I therefore request that you withdraw your request for an affidavit.

Mr. Nicholas: The Passport Office feels that it was justified in making the request for the affidavit and will not withdraw it.

Mr. Boudin: Will you furnish me with a copy of this transcript?

Mr. Nicholas: If the record can be successfully transcribed you will be permitted to see a copy of the transcript.

Mr. Briehl: I would like an unequivocal answer from Mr. Nicholas why all these delays in obstructing my obtaining a passport other than it is Regulations and must be referred to other Departments. I would like to know why there is this delay.

Mr. Nicholas: We have acted upon your case as promptly as it was possible considering the volume of work and the necessity of obtaining information from other offices. We will be glad to expedite our part of the case as much as possible but we have to deal with perhaps a half million American citizens each year who are applying for passports. We do the best we can with the personnel we have.

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72 **Exhibit 10**

ARTICLE REFERRED TO IN PASSPORT HEARING

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73 ENVIRONMENT AND NEUROSIS

WALTER BRIEHL, M.D.

In terms of etiology we think of neurosis as characterized by fixation points at, and regression to, infantile patterns of behavior because of frustration imposed in early life, especially by the parents, and later by parental substitutes. Freud says that every normal as well as every neurotic person inevitably passes through a neurotic phase during childhood. The neurotic adult is thus characterized quantitatively by the amount of infantilism remaining in his adult ego.

Each of us has a coefficient of neurosis, that is, a point where continued emotional stress and strain will impair our

coordinated, smooth functioning. Ferenczi, Freud's earliest collaborator and colleague, says: "According to the psychoanalytic view no one is completely secure against the too powerful or too prolonged emotional strain of shock, the only significance of temperament being that the individual who is severely taxed from birth is damaged by lesser, and the more robustly constituted by greater shock."

Assuming in a given case, that there are no marked constitutional factors, or better, where none seem to exist, what are the environmental forces that make for normal or neurotic behaviour? *In the very early years of life* such forces come exclusively from the parents—there are only two of them—*love and frustration.* They are of vital importance in the development of the child and on their interplay and regulation depends whether the child shall develop normally or with a neurosis or neurotic disposition.

A new born child is an absolutely helpless creature. It can move its extremities but it cannot change its location in space. It can eat but its food must be placed within the confines of its mouth. In this condition of helplessness, any frustration in the form of lack of attention, in the matter of nourishment or hygiene, might have fatal consequences.

But as weeks and months advance the infant becomes less helpless biologically and parental frustrations begin. One of the first of these frustrations is that a two o'clock in the morning feeding is discontinued if the child is thriving. It is deprived of food for a period of 7 to 8 hours at night and the daily intervals are also increased.

Why does the child accept such frustrations at all? Because it wishes to retain the love and affection of its parents; hence it submits to being civilized and socialized—to "growing up," until it is able to function as an adult itself. Thus we see that the ideal parent is the one who, by balancing love and frustration, really weans the child away from parental dependence so that it can function in the world. The paternal and maternal instinct not only implies "We love you, we want you," it also implies "We will provide

for you." If these two basic requirements are not met, there is a problem even before the child is born.

The love-frustration mechanism between parent and child —the mechanism which helps the child grow up into normal manhood or womanhood—can operate smoothly to his end only when the child is wanted and when there is a favorable social and economic and educational atmosphere for the child to grow up in. The first point implies that no child need be born to parents who do not want to have a child. Knowledge of birth control and a conscience free of guilt for its practice, alone can guarantee that the parents will love the coming child. This does not mean that unwanted children are not loved. It does mean, however, that no conflict in relation to the child's existence will have to be repressed before it can be loved. The second point dealing with a favorable environment implies namely that the child should be born in a home free of undue stress and strain, a home where fear and worry and insecurity are minimized. The mental health of the parents is not less important than their physical health. The home should be a fit place of habitation with ample light and air and a room for the child, rather than a crib in the room of the parents where it witnesses and reacts with fear and anxiety or with confusion to the sexual relation of the parents.

Today we live in a world which essentially rejects the individual. This rejection manifests itself in the form of unemployment; in the form of not providing him with basic physical and health necessities when he is unemployed; and in the form of not giving him the opportunity to develop and live a full life, which, among other things, means the opportunity to marry and to raise a family which will live in at least minimum security.

Earlier we pointed out the love-frustration mechanism between parent and child which is the factor bringing about the child's development from the infantile, narcissistic, social ego to the adult social ego. These frustrations which were balanced with love, kindness and understanding on

the part of the parents, were both useful and necessary. They might be called constructive frustrations.

But unemployment, lack of educational opportunity for development, absence of basic physical needs of food and clothing, are essentially destructive frustrations and do not lead to integration but to disintegration and dissociation of the personality. It is true that a person with a relatively resistant psychic structure can still preserve his mental health under extremely adverse circumstances. But a less well integrated personality will fail to preserve itself owing to the dissipation of energy consumed in internal conflicts.

All persons are liable to suffer a nervous breakdown if emotional strain is carried beyond a certain degree, this degree varying from one person to another. In war, for instance, only men who seem normal are selected as soldiers. Yet under stress of fighting and battle, the threshold of resistance is exceeded and large numbers of men are affected with neurosis, who under conditions of peace would have remained well. Civilians are likewise affected in the tension and stress of war and the weaker ones succumb under these conditions.

In today's changing world, too, the individual lives under a condition of stress and strain. There is a
74 parallel between the way such unfavorable conditions influence and condition neurosis and the way they influence physical health. In medicine, people may be classified into three groups from the point of view of health:

1. Those who are healthy even when conditions around them are unfavorable.

2. Those who are healthy when conditions around them are favorable.

3. Those who are ill even when conditions are favorable.

When conditions become more unfavorable we know that fewer remain in the first group of health. Those in the second group do not remain healthy. Those in the third group become more ill. This is just as true of mental health. There are fewer in the first group of those who can stave

off neurosis under unfavorable conditions. Those in the second group, healthy when conditions are favorable, become borderline or actual neurotics; while those in the third group regress deeper into their neuroses.

What is the ultimate result of the friction, frustration and rejection of the individual in this social environment? The individual lives in a continual state of conflict. His reaction to this conflict can be a normal one or a neurotic one. In the former case, the normal reaction, the frustrated ego will try either to dominate or master the difficulty, or else seek other outlets for gratification and expression; that is, he will renounce the object and tolerate the frustration. But what is the individual to do when he has already tried to master a situation which cannot be mastered; for example, to obtain employment when there are no jobs? Suppose he tolerates the frustration and receives relief—Where then is the ego gratification, which is a requisite for a unified and integrated personality?

Moving in this vicious circle of frustration and rejection there is but one avenue of escape—*regression*, which means either criminal behavior or neurotic behavior. From psychoanalytic research we know that the unconscious of a criminal, a neurotic and a normal person is practically identical and that this unconscious is anti-social in character. The criminal lives out his anti-social instincts in anti-social acts of delinquency and crime. The neurotic however, because of a super-morality, emanating from his super-ego, represses his anti-social instincts both in thought and in action. Paralyzed by guilt and anxiety he cannot function efficiently. The normal person is able to control his anti-social impulses and sublimate them for useful ends.

With the lack of opportunity in employment and self-development, the criminal ego, which suffers from a lack of parental love and super-ego, now reactivates and reverts to its anti-social impulses.

With the same lack of opportunity in employment and development the neurotic ego also reactivates and reverts

to infantile patterns, chief of which is a strong dependent attachment to the parents. The world is too unkind and brutal, too frustrating and rejecting. The neurotic develops a greater feeling of anxiety and insecurity, which already exists to a large degree because of unresolved infantile problems. He is less apt to regress, to the degree that the world accepts him and makes conditions of living bearable; but in the absence of a kind environment he will, either in reality or phantasy, return to the life of his childhood and infancy when his actual mother fretted and worried about his welfare. The neurotic mother, anxious and worrying about a child, fills it with fear about the world—and when the child grows into it, all too often he has such fears confirmed rather than dispelled.

The objective in therapy of a neurosis is to reduce and wean away the libido of the patient from infantile protection love objects—the parents—to objective relationships in the world. This process is facilitated and aided to the extent that the individual finds a receptive world and complicated to a degree that the individual finds a hostile, rejective world.

It has been my experience frequently in working with patients at a mental hygiene clinic who come, not with symptoms but as they say, with "troubles," that therapeutic work runs into an impasse because of environmental limitations. Idleness breeds deterioration and this factor handicaps therapy tremendously. As the building stones of a neurotic personality are loosened, a synthesis must take place, that is, libido, which has been bound in neurotic patterns and which is now loose must be utilized and sublimated into channels which will give the individual some form of gratification and reward. Employment is especially conducive to such sublimation and solidification of the new ego. Without it the new ego dangles and gropes hopelessly to find new objects, all the time bordering dangerously on relapse and regression to previous patterns and infantile objects.

If a neurosis is the sole obstacle between an individual and happiness then our sole task is to resolve his neurosis. But if there is a second obstacle, an environment with contradictions and evils which make the level of happiness low for even a normal person, then society owes just as much attention to this aspect of the problem.

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76 **Exhibit 11**

Filed Feb. 1, 1956

August 31st, 1955

John W. Sipes, Esq.
Board of Passport Appeals
Department of State
Washington, D. C.

Re: Passport Application—Dr. Walter Briehl

Dear Mr. Sipes:

In accordance with your suggestion, this is written to confirm my request, made orally to you yesterday over the telephone.

I advised you that I had appeared at a Hearing in the Passport Office, with my client, Dr. Walter Briehl; that Dr. Briehl's case had been pending for many months and that it was necessary that we should have a final hearing before the Passport Office, prior to Dr. Briehl's departure from the East, immediately after Labor Day.

I advised you, further, that Dr. Briehl had declined to execute the affidavit requested by Mr. Nicholas, and I inquired as to whether or not this refusal would affect his right to file a petition and to be heard by the Board. I did not receive a definite reply on this point from you.

Dr. Briehl is a very busy psychiatrist, who resides in California and must return to his practice, within a day or day after Labor Day.

He wishes to be present at the Hearing before the Board, but if the Board Hearing is not held immediately, it will be difficult, if not impossible, for Dr. Briehl to appear personally at such Hearing.

Under these circumstances, I requested yesterday, and repeat my request, that the Department make appropriate arrangments to render a decision, through its Passport Office, and to have this case heard by the Board of Passport Appeals, not later than next Tuesday.

May I have your immediate response.

Very truly yours,

LEONARD B. BOUDIN
for RABINOWITZ & BOUDIN

lbb/fal
SPECIAL DELIVERY

77

Exhibit 12

Special Delivery August 31st, 1955

Filed Feb. 1, 1956

Mr. Ashley Nicholas
Deputy Director, Passport Office
Winder Building
Washington, D. C.

Re: Passport Application, Dr. Walter Briehl

Dear Mr. Nicholas:

Dr. Briehl has advised me that, after talking to Mr. Franz Mathes, he made arrangements with a Recording Company to have records of yesterday's Hearing ~~taken~~ down on a tape recorder. Nevertheless this agreement was countermanded by you in the afternoon, when the Recording Company representative arrived.

You will realize that the record is the best evidence of the hearing and that we, therefore, are entitled either to

the records now in your possession or to a tape recording of them.

I must therefore ask you to reconsider and to advise me that this procedure is acceptable to you. However, in the event that you should decline to follow this procedure, then I, of course, shall expect you to send me a stenographic record made from the recording.

Subsequently, I shall take such appropriate action in Court as I deem advisable to secure the recording itself.

I also call your attention to the necessary for speed in this case and request that a decision be made by your office, before the week-end, so that the Board of Passport Appeals may have the opportunity to hear this case before Dr. Briehl leaves for the West.

Very truly yours,

LEONARD B. BOUDIN
for RABINOWITZ & BOUDIN

lbb/fal

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78 **Exhibit 13**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

September 2, 1955

Dear Mr. Boudin:

I have your letter of August 31, 1955 concerning the passport application of Dr. Walter Briehl.

It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office. The Board has not been advised of

any further processing of this case under Section 51.137 of the Passport Regulations.

In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156 (2) and 51.147 (22 CFR) of the Rules of the Board.

Sincerely yours,

JOHN W. SIPES
John W. Sipes
Counsel
Board of Passport Appeals

LEONARD B. BOUDIN, ESQUIRE
RABINOWITZ & BOUDIN
Attorneys at Law
25 Broad Street
New York 4, New York

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79 **Exhibit 14**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

Sep. 16, 1955

In reply refer to
F 130-Briehl, Walter

Mr. Leonard B. Boudin
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

Dear Mr. Boudin:

Reference is made to your letter of September 12, 1955 requesting a decision in the case of Dr. Walter Briehl.

You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain

or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl.

Sincerely,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

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80 **Exhibit 15**

Filed Feb. 1, 1956

September 19, 1956

John W. Sipes
Counsel
Board of Passport Appeals
Department of State
Washington, D. C.

Re: Dr. Walter Briehl

Dear Mr. Sipes:

I have your letter of September 2, 1955 regarding the passport application of Dr. Walter Briehl.

Your letter is somewhat obscure in its reference to the passport regulations and the rules of the Board. Do I understand correctly that there are two conditions to an appeal: first that the request of affidavit be executed and second that the passport office describe its decision as a final one?

May I have your immediate reply to this inquiry.

Very truly yours,

LEONARD B. BOUDIN

LBB:a

81 **Exhibit 16**

Filed Feb. 1, 1956

September 20, 1955

John W. Sipes, Esq.
Counsel
Board of Passport Appeals
Department of State
Washington, D. C.

Dear Mr. Sipes:

I enclose a letter received today from the Director of the Passport Office declining to render a decision in the case of Dr. Walter Briehl.

I assume from your letter of September 2, and our correspondence in other cases that the Board will not entertain an appeal from Miss Knight's decision.

Will you be good enough to advise me whether I am correct. Should I be in error on this point, we shall appeal immediately to the Board.

Very truly yours,

LEONARD B. BOUDIN

LBB:a
enclosure.

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82 **Exhibit 17**

Filed Feb. 1, 1956

September 27, 1955

John W. Sipes, Esq.
Counsel, Board of Passport Appeals
Department of State
Washington, D. C.

Dear Mr. Sipes:

I have not received any reply to my letter of September 20, in which I inquired as to whether the Board would

entertain an appeal in the case of Dr. Walter Briehl where the Passport Office declined to render a decision because of his refusal to execute an affidavit under section 51.142. I should appreciate receiving your response by return mail.

Sincerely yours,

LEONARD B. BOUDIN

LBB:J

83

Exhibit 18

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

September 29, 1955

Dear Mr. Boudin:

I have your letters of September 19, 20, and 27, 1955, concerning whether the Board of Passport Appeals will entertain an appeal in the case of Dr. Walter Briehl.

As you are fully aware, the Board of Passport Appeals was established (22 C.F.R. 81.139) to act on appeals from decisions adverse to the passport applicant (22 C.F.R. 51.138), pursuant to the provisions of Sections 51.135 or 51.136 of the Passport Regulations. The Board is unaware of such an adverse decision in Dr. Briehl's case.

Sincerely yours,

JOHN W. SIPES
John W. Sipes
Counsel
Board of Passport Appeals

Leonard B. Boudin, Esquire
Rabinowitz & Boudin
Attorneys at Law
25 Broad Street
New York 4, New York

84 Filed Feb. 23, 1956

Cross-Motion for Summary Judgment

Comes now the defendant and by his attorney, the United States Attorney for the District of Columbia, moves the Court to order summary judgment in his favor upon the ground that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law.

Attached hereto and made a part hereof is the affidavit of Frances G. Knight, Director of the Passport Office of the Department of State.

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120 Filed Feb. 23, 1956

Affidavit of Frances G. Knight

I, Frances G. Knight, being duly sworn, depose and say that:

(1) I am the Director of the Passport Office of the Department of State and am charged by the Secretary of State with the responsibility for determining the action to be taken in the first instance on all passport applications.

(2) The plaintiff was issued a passport on May 6, 1953.

(3) Subsequently, upon the expiration of the passport, two years later, the plaintiff requested a renewal thereof.

(4) On May 13, 1955, I informed the plaintiff in writing that his request for renewal had been considered under the Supplement to Passport Regulations, Section 51.135 of which provides for the refusal of passports to persons in the following categories:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not

otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party; and

"(b) persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement."

121

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully, of advancing the movement."

In this connection, Dr. Briehl was asked to furnish an affidavit setting forth whether he was then or ever had been a Communist and to explain his connections with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. A copy of my letter is attached as Exhibit A.

(5) On May 20, 1955, the plaintiff, through his attorney, Daniel G. Marshall, replied to the Department in writing that he refused to submit the affidavit requested.

(6) On May 31, 1955, I sent Dr. Briehl a letter, tentatively disapproving his application for renewal of his passport on the ground that further passport facilities were precluded under the provisions of Section 51.135 of the Passport Regulations, and informing him, in accordance with the Department's practice, of the reasons for the disapproval of his application insofar as the security

regulations would permit. He was informed of his right to appear before a hearing officer of the Passport
122 Office and to be represented by counsel. He was told further that at the hearing he would be required to submit a sworn statement as to whether he was then or ever had been a Communist. A copy of this letter is attached as Exhibit B.

(7) Subsequently, on August 30, 1955, an informal hearing was held in the Passport Office, at which Dr. Briehl and his attorney, Leonard Boudin, appeared. Dr. Briehl continued to refuse to execute the affidavit requested. A transcript of the hearing is attached as Exhibit C.

(8) On September 16, 1955, I informed Mr. Boudin in writing that, in view of Dr. Briehl's refusal to submit an affidavit concerning present or former membership in the Communist Party, the Department knew of no further action which it could appropriately take in his case. A copy of this letter is attached as Exhibit D.

(9) The reasons why I deemed it necessary, and still deem it necessary, to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present and past membership in the Communist Party are contained in reports of a confidential character furnished the Department by another agency of the Government indicating the following concerning the plaintiff:

He was in 1945 a member of the Los Angeles County Communist Party; he held Communist Party meetings in 1950 in his medical offices; he contributed in 1936 and 1941 articles to the publication "Social Work Today", which has been characterized as a Communist publication and he contributed $1,000 in 1949 to the Civil Rights Con-
gress Bail Fund to be used in raising bail on behalf
123 of the convicted Communist leaders in New York City. In addition, these reports indicate that as of May, 1951, he was a member of the Hollywood Arts, Sciences and Professions Council, the Southern California

Chapter of the National Council of Arts, Sciences and Professions, an organization cited by the Attorney General as Communist; that he had contact with the American Committee for the Protection of the Foreign Born, an organization cited by the Attorney General as Communist; and that he attended in 1945, while an officer in the Army, meetings of the Bookshop Association, St. Louis, Missouri, which is reported to have been dominated by the Communist Party in the St. Louis area.

FRANCES G. KNIGHT
Frances G. Knight

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86 Filed Feb. 23, 1956

Exhibit B

May 31, 1955

In reply refer to
F130-Briehl, Walter

Dr. Walter Briehl,
2060 North Vine Street,
Los Angeles, 28, California.

Dear Dr. Briehl:

The Department has received a letter dated May 20, 1955 from your attorney in which he states that you decline to furnish the Department with the affidavit which was requested in the Department's letter to you dated May 13, 1955.

I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of

Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los
86a Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated.

Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concerning the reasons why he was denied a passport or the Department's action in his case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State:
FRANCES G. KNIGHT
Director, Passport Office.

The Deputy Clerk: Briehl v. Dulles.

Mr. Boudin: It is in my mind to rest upon the argument previously made in the Kent case, since the issues are essentially the same. I don't know whether Your Honor has already read the papers as well.

The Court: I have read the papers.

Mr. Boudin: Does Your Honor see a distinction?

The Court: I do not.

Mr. Boudin: One would have to argue in order to make a distinction, I suppose, basically that the legitimacy of travel for the purpose of attending a psychiatric and

psychoanalytic congress is greater than the right to travel for the purpose of painting.

As Your Honor knows, Dr. Briehl is a well known, internationally known psychiatrist who attended the psychoanalytical conference in 1953 in Europe, was denied the opportunity by the State Department in 1955 to do so, and to attend them in 1956 on the declination to execute as a matter of fundamental principle this affidavit as demanded.

I take it from Your Honor's attitude and expression that your views will be the same in the Briehl case.

The Court: I think so. I will make the same ruling in the Briehl case.

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74 Filed April 12, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5441-55

ROCKWELL KENT, *Plaintiff*

v.

JOHN FOSTER DULLES, *Defendant*

Washington, D. C.
March 28, 1956

85 **Opinion of the Court**

The Court: (McGarraghy, J.) I am prepared to rule, to express my view on the case. In my opinion the passport regulations in question are valid and reasonable regulations.

Further, in my opinion the plaintiff is not entitled to relief because he fails first to show he has exhausted his administrative remedies, and, second, because he fails to qualify for a passport in that he has failed to make the

non-Communist affidavit which the valid regulations require, and therefore I will deny the motion for a preliminary injunction and will deny the plaintiff's motion for summary judgment and grant the Government's motion for summary judgment.

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124 Filed Mar. 29, 1956

Order

Upon consideration of plaintiff's motions for preliminary injunction and for summary judgment, and of defendant's cross-motion for summary judgment, and it appearing to the Court that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this 29th day of March 1956

ORDERED that the defendant's cross-motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED that the plaintiff's motion for preliminary injunction be and the same hereby is denied, and it is

FURTHER ORDERED that the complaint herein be and the same hereby is dismissed.

JOSEPH C. MCGARRAGHY
Judge

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125 Filed Mar. 30, 1956

Notice of Appeal

Notice is hereby given this 30th day of March, 1956, that the plaintiff, Walter Briehl, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of March, 1956, in favor of the defendant, John Foster Dulles, against said plaintiff.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13317

WALTER BRIEHL, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

EDGERTON, *Chief Judge*, announced the judgment and division of the court as follows:

The judgment of the District Court, granting the Secretary's motion for summary judgment, is affirmed.

Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm. Judges Edgerton and Bazelon vote to reverse. Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary. Judge Burger took no part in the consideration or decision of this case.

Judge Prettyman files an opinion in which Judges Miller, Danaher and Bastian concur. Judge Washington files an opinion concurring in the result reached by Judges Prettyman, Miller, Danaher and Bastian, p. 29. Judge Bazelon files a dissenting opinion in which Judge Edgerton concurs. p. 34. Judge Edgerton also files a separate dissent. p. 70. Judge Fahy files a dissenting opinion. p. 71.

PRETTYMAN, *Circuit Judge*, with whom WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*, concur: Appellant, Dr. Walter Briehl, applied in April, 1955, to the Department of State for renewal of a passport, stating his desire to attend an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. He was and is engaged in the practice of medicine, specializing in psychiatry. In prior years he had attended international meetings in this field. The Director of the Passport Office wrote him that "it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations. Dr. Briehl's attorney replied, saying in part:

> "My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments."

The attorney described Dr. and Mrs. Briehl's professional interests and concluded by saying: "Demand is

hereby made that passports as applied for by them be issued forthwith."

Thereupon the Director of the Passport Office wrote Dr. Briehl, saying in part:

> "I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.
>
> "In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist."

Dr. Briehl's attorney replied in part:

> "[My clients] wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country."

Thereafter the attorney wrote several times demanding the issuance of the passports and "an evidentiary hearing". An "informal" hearing was arranged. Dr. Briehl, his attorney, and two representatives of the State Department attended. The attorney made an extended statement, in the course of which he recounted the correspondence, described Dr. Briehl's purposes in seeking to go abroad, and made three points as follows:

> "Our first point, therefore, is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to

participate in conferences by injecting this issue of politics in connection with his travel abroad. When a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliation, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. * * * My second point is that everyone has the right to travel regardless of political considerations. * * * Now we turn to the third point. * * * that you confront us with the evidence against Dr. Briehl. * * * It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. * * * [W]e have a right to what the courts have now called a quasijudicial hearing, * * *; and * * * it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States."

The attorney later said:

"* * * Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal."

In response to a letter from Dr. Briehl's attorney, counsel for the Board of Passport Appeals replied:

"It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office

The Board has not been advised of any further processing of this case under Section 51.137 of the Passport Regulations.

"In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156(2) and 51.147 (22 CFR) of the Rules of the Board."

And a few days later the Passport Office wrote:

"You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

"In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl."

Dr. Briehl filed a civil action in the District Court, naming the Secretary of State as defendant. He prayed for a judgment decreeing that he is entitled to a passport under the statutes, that the passport regulations of the Secretary of State are invalid and illegal; and that the refusal to renew the passport was in violation of his (Briehl's) rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations; enjoining the Secretary from continuing to deny the passport; and directing him to renew the passport.

The Secretary answered, and a motion and a cross motion for summary judgment were made, with supporting affidavits and exhibits. The court rendered a brief opinion, denied the plaintiff's motion, and granted the motion of the Secretary.

In this court Dr. Briehl divides his argument into four main points:

1. Appellant's constitutional right to travel could not be conditioned upon his execution of a non-

Communist affidavit or compliance with any other political test.

2. Appellee's regulations deprive appellant of procedural due process and the quasi-judicial hearing to which he is entitled under the recent decisions of this Court.

3. The regulations are not authorized by statute, they conflict with the will of Congress and were invalidly promulgated.

4. The Secretary has not made out a case against appellant, even under the Regulations.

The arguments thus advanced involve consideration of six basic subjects.

I

The nature of the Communist movement. Dr. Brichl's underlying premise, as shown by the statements we have quoted, is that Communist membership or affiliation is a matter of politics, an issue of political affiliation, a political consideration, a political test, and thus is subject to the same rules which apply to political beliefs generally. But it is not so. The Communist organization and program have long since passed beyond the area of mere politics and political opinion. All three branches of the Federal Government—the executive, the legislature, and the judiciary—have declared unequivocally that the Communist movement today is an international conspiracy aimed at world domination and a threat to the internal security of this country. The foreign policy and a large part of the fiscal policy of the Government are based upon that proposition.

The Congress declared in 1950:

> "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the

world through the medium of a world-wide Communist organization."[1]

President Truman declared in 1950:[2]

"WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

"WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; * * *."

In his Inaugural Address of January, 1957, President Eisenhower said:

"The divisive force is international communism and the power that it controls.

"The designs of that power, dark in purpose, are clear in practice. It strives to seal forever the fate of those it has enslaved. It strives to break the ties that unite the free. And it strives to capture—to exploit for its own greater power—all forces of change in the world, especially the needs of the hungry and the hopes of the oppressed."[3]

In his State of the Union speech on January 10, 1957, the President had said: "The existence of a strongly armed imperialistic dictatorship poses a continuing threat to the free world's and thus to our own Nation's secu-

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[1] 64 STAT. 987, 50 U.S.C.A. § 781(1).

[2] Proc. No. 2914, 64 STAT. A454, 50 U.S.C.A. App. 6 (1951).

[3] 103 CONG. REC. 729 (daily ed. Jan. 21, 1957).

rity and peace."[4] He referred to "Communist persecution", and to "Soviet aggression".[5]

The Supreme Court has held valid and sufficient the findings of Congress[6] and the findings of a jury[7] to the same import as the foregoing declarations. In *Galvan* v. *Press* the Court quoted the above-quoted congressional finding and said: "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."[8] In *American Communications Ass'n* v. *Douds*[9] the Court, balancing the interest of the public against a partial abridgement of speech, upheld the statutory requirement that a person must swear he is not a member of the Communist Party before he can avail himself or his organization of the processes of the Labor Board.[10]

There exists in some quarters a dogged insistence that the Communist movement be treated as any other political organization. It is as though one argued that, since opiates and aspirin both possess medicinal properties, they must be subjected to the same permissions and restrictions. The fact is that opiates are to be and are regulated because of their own peculiar characteristics. And so is the Communist movement and its affiliates. It

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[4] 103 CONG. REC. 389 (daily ed. Jan. 10, 1957).

[5] *Id.* at 390.

[6] Galvan v. Press, 347 U.S. 522, 98 L.Ed. 911, 74 S.Ct. 737 (1954).

[7] Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[8] *Supra* note 6, 347 U.S. at 529.

[9] 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).

[10] And see the opinion of Mr. Justice Jackson in American Communications Ass'n v. Douds, *id.*, 339 U.S. at 424 *et seq.*, with its accumulation of underlying data.

would be inexcusably naive for any court to declare in the present state of the world that adherence to the Communist cause is a mere matter of politics or political opinion. We shall treat the Communist movement according to what the Congress, the President, and the Supreme Court have declared it to be.

II

The power of government in foreign affairs. Whatever may be the dispute—and it has been extended and intense—as to the division of this power as between the President and the Congress, it seems settled beyond dispute that those two branches between them possess the totality of the power. In a long line of cases, beginning perhaps with *Foster* v. *Neilson*[11] and extending down to *United States* v. *Curtiss-Wright Corp.*,[12] *United States* v. *Belmont*,[13] *Chicago & Southern Air Lines* v. *Waterman Corp*,[14] and *Ludecke* v. *Watkins*,[15] the Supreme Court has laid down the rule that foreign affairs and decisions upon foreign policy are political matters entrusted by the Constitution to the political departments of the Government, and that the judiciary has no part in them. Mr. Justice Jackson, writing for the Court in the *Chicago & Southern Air Lines* case, stated the proposition in succinct, quotable terms. He wrote:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has avail-

[11] 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829).

[12] 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936).

[13] 301 U.S. 324, 81 L.Ed. 1134, 57 S.Ct. 758 (1937). *Belmont* is discussed at length and with approval in United States v. Pink, 315 U.S. 203, 86 L.Ed. 796, 62 S.Ct. 552 (1942).

[14] 333 U.S. 103, 92 L.Ed. 568, 68 S.Ct. 431 (1948).

[15] 335 U.S. 160, 92 L.Ed. 1881, 68 S.Ct. 1429 (1948).

able intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." [16]

The range of permissible judicial action in the case at bar is narrowed also by the fact that the Secretary is acting in the context of a national emergency. Only the President may declare an emergency; he has done so.[17] The existence of an emergency indisputably enhances both executive and legislative power.[18] The Secretary has acted pursuant to two acts of Congress,[19] which not only recognize the administrative function of the executive in this area but also delegate to the execu-

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[16] *Supra*, 333 U.S. at 111. Extensive discussions of the doctrines underlying the powers of the President are in the opinions in Youngstown Co. v. Sawyer, 343 U.S. 579, 96 L.Ed. 1153, 72 S.Ct. 863 (1952).

[17] Proc. No. 2914, *supra* note 2.

[18] Hirabayashi v. United States, 320 U.S. 81, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943).

[19] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a; 66 STAT. 190 (1952), 8 U.S.C.A. § 1185.

tive any rule-making power it may have lacked. Thus the Secretary's acts are buttressed by the sovereign power to defend the nation.

There are of course in any government formed upon a constitution residual areas within which the judicial branch may act in respect to a power even so unfettered as is the executive power in foreign affairs. If the President were in gross defiance of constitutional limitations, or perhaps even of congressional prohibitions, the judiciary might act. The Supreme Court has also held[20] that, where the Secretary refused to issue a passport solely upon an erroneous finding of mixed law and fact (in that case citizenship), a decree precluding his denial on that ground could issue.

It must be kept in mind that the power of the judiciary to inquire is vastly different from its power to act. A court often has jurisdiction to determine whether it has jurisdiction. The books are full of cases in which the courts have examined with meticulous care complaints alleging invalidity of executive action in foreign affairs. But seldom if ever have the courts found grounds to impose upon such executive action their own ideas of propriety or wisdom. So in the case at bar it is not suggested that the court could not entertain a complaint against the Secretary of State alleging the illegality of his action. The point is that having examined the allegations the court is without power to act save in a narrow and limited class of extraordinary circumstances.

The inquiry in the case before us is whether the Secretary has so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review.[21]

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[20] Perkins v. Elg, 307 U.S. 325, 349, 83 L.Ed. 1320, 59 S.Ct. 884 (1939).

[21] See Carrington, *Political Questions: The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956).

III

The nature of a passport. In *Urtetiqui* v. *D'Arbel*[22] the Supreme Court said in 1835:

> "It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."[23]

But, whatever may have been its nature in the past, the pertinent characteristic of a passport in the present controversy is that it is a requisite for going abroad. And thus it has become a tool with which the Department of State can prevent the presence of any American citizen in a foreign country.

A statute,[24] alluded to by the Supreme Court in *Johnson* v. *Eisentrager*,[25] provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So one of the questions here is whether the

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[22] 34 U.S. (9 Pet.) 692, 699, 9 L.Ed. 276.

[23] See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 259 (1942).

[24] 15 STAT. 224 (1868), 8 U.S.C. § 903b [now 22 U.S.C.A. § 1732 (Supp. 1956)].

[25] 339 U.S. 763, 770, 94 L.Ed. 1255, 70 S.Ct. 936 (1950).

Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion might involve the United States Government in international complications.

IV

The right to travel. The present dispute over passport denials is less than a decade old, but its antecedents are to be found deep in the history of Anglo-American law. The English sovereign had for many centuries a recognized right to prevent foreign travel and to recall subjects from abroad.[26] Late in the Eleventh Century Anselm, Archbishop of Canterbury, was forbidden by William Rufus, son of William the Conqueror, to go to Rome to receive the pallium from Pope Urban II.[27] The Magna Carta, as signed by John Lackland at Runnymede in 1215, deprived the King of the right to prevent foreign travel. However John died shortly afterward, and William Marshall, regent of Henry III, republished the Charter without the guarantees of freedom of travel.[28] In the following centuries the kings frequently exercised their prerogative, usually through the issuance of a writ *Ne Exeat Regnum*.[29] Parliament also exercised the prerogative by passing statutes which forbade foreign travel to certain classes[30] or which recognized the right of the

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[26] 1 BL. COMM. * 265; 3 CO. INST. * 178; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 230 (6th ed. 1938); TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL LAW 128-130 (4th ed. 1890).

[27] 2 ENCYCLOPAEDIA BRITANNICA, *Anselm* (1945); BEAMES, NE EXEAT REGNO 1-2 (2d ed. 1824).

[28] See Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63, (1952), for a detailed account of the history of the Magna Carta and the status of the common law in this regard.

[29] 3 Co. INST. * 179.

[30] *Id.* at * 178-179.

King to limit travel.[31] However the writ has gradually fallen into disuse. It is most unlikely that a writ *Ne Exeat Regnum* would issue in modern England, except in time of war.[32] This does not mean that an Englishman has an enforceable right to a passport.[33]

The Articles of Confederation[34] and the Constitution of the United States[35] clearly recognized the right of citizens to travel among the various states. But whether the liberty mentioned in the Fifth Amendment included liberty to leave this country and circulate among foreign nations was not so clear. A three-judge federal District Court recognized in 1952 that a citizen has at least a limited right to international travel.[36] This court has since recognized that right.[37] However the existence of this limited right does not preclude the existence in the sovereign of a right to limit travel. The Supreme Court has established the power of the Government to recall a person from abroad to appear in a lawsuit, an exercise of the same sort of control over movement available to the English sovereign through *Ne Exeat Regnum*. In *Blackmer* v. *United States*[38] the Court made the broad

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[31] 5 RICHARD II, c. 2, §§ 6, 7 (1381), 2 STAT. AT L. 236 (Pick. 1762).

[32] See Note, 41 GEO. L.J., *supra* note 28, at 70; Diplock, *Passports and Protection in International Law*, 32 GROTIUS SOC. 42, 44 (1947).

[33] Diplock, *supra* note 32, at 53.

[34] Art. IV.

[35] Art. IV, § 2. See Hess v. Pawloski, 274 U.S. 352, 71 L.Ed. 1091, 47 S.Ct. 632 (1927); Williams v. Fears, 179 U.S. 270, 45 L.Ed. 186, 21 S.Ct. 128 (1900).

[36] Bauer v. Acheson, 106 F.Supp. 445 (D.C.D.C.).

[37] Shachtman v. Dulles, 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).

[38] 284 U.S. 421, 437-438, 76 L.Ed. 375, 52 S.Ct. 252 (1932).

statement:

> "What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States."

While *Blackmer* refers to the power to limit foreign travel as being exercised by the Congress, the power is not solely congressional. In matters pertaining to war and emergency or to the foreign policy, the power may reside in the executive or in both branches jointly. Whatever the theoretical residence of such power, the power to limit travel has in fact been exercised through the cooperative efforts of Congress and the President. During the War of 1812 Congress forbade citizens to travel into enemy countries without passports.[39] During the Civil War passports were required of all persons entering or leaving the country.[40] In 1861 Secretary of State Seward ordered that "Until further notice, no person will be allowed to go abroad from a port of the United States without a passport either from this Department or countersigned by the Secretary of State". This action was taken by the executive branch on its own initiative, without the sanction of Congress.

In 1856 Congress had granted the Secretary of State sole authority to issue passports.[41] The Secretary was authorized to issue them "under such rules as the President shall designate and prescribe". In 1918 Congress, leaving intact the broad discretion inherent in the words just quoted, gave the President power to make it unlawful to leave the country in time of war without a

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[39] 3 STAT. 199 (1815).

[40] DEP'T OF STATE, THE AMERICAN PASSPORT—HISTORY AND DIGEST 50 (G.P.O. 1898).

[41] 11 STAT. 60.

passport.[42] The President exercised this power by an appropriate proclamation.[43] The period between the two World Wars saw Congress reaffirm in the executive the broad discretion declared in the 1856 act, the new language being "may grant".[44] This was in a 1926 act which remains today the underpinning of congressionally-granted executive power in the field. That period also witnessed the codification in 1938 of State Department passport regulations and their affirmation by executive order.[45]

The machinery which today enables the State Department to regulate travel through passport control began to take shape in June of 1941, when Congress[46] amended the act of 1918[47] to enable the President to make it a crime to leave the country without a passport, not only in time of war but also during the existence of the national emergency proclaimed by the President on May 27, 1941.[48] On November 14, 1941, President Roosevelt exercised the authority over entry and exit vested in him by the amendment.[49] President Truman declared the termination of that state of emergency on April 28, 1952.[50] But the termination of the World War II emergency did not affect the Korean emergency, declared by President

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[42] 40 STAT. 559, 22 U.S.C.A. §§ 223-226b (1952).

[43] 40 STAT. 1829 (1918).

[44] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a.

[45] Exec. Order No. 7856, 3 FED. REG. 681, 22 C.F.R. §§ 51.1-51.77 (1949).

[46] 55 STAT. 252, 22 U.S.C.A. § 223 (1952).

[47] *Supra* note 42.

[48] Proc. No. 2487, 55 STAT. 1647.

[49] Proc. No. 2523, 55 STAT. 1696.

[50] Proc. No. 2974, 66 STAT. C31, 50 U.S.C.A. App. 3 (Supp. 1956).

Truman on December 16, 1950.[51] Consequently our nation has been in a continuing state of emergency since May of 1941.

By act of June 27, 1952,[52] Congress declared:

> "SEC. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof; * * *
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> "(b) * * * and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

This statute applies to any national emergency. It would appear that the Korean emergency, existing when the statute became law, made the section above quoted immediately operative. Any doubt on this score was removed by President Truman's proclamation of January 17, 1953,[53] specifically invoking the 1952 act.

Two conclusions emerge from this complex series of laws, proclamations and orders. First, it is forbidden to leave this country without a passport. This rule was specifically provided by the Congress in the 1952 act, by the President in Proclamation No. 3004,[54] and by the

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[51] Proc. No. 2914, *supra* note 2.

[52] 66 STAT. 190, 8 U.S.C.A. § 1185.

[53] Proc. No. 3004, 67 STAT. C31.

[54] *Ibid.*

Secretary in Section 53.1 of his Regulations.[55] Second, it is within the power of the Secretary of State to refuse to issue a passport. This power is lodged in him by the act of 1926,[56] as implemented in Section 124 of Executive Order No. 7856;[57] is both claimed by the Secretary in Sections 53.1-53.9 of the Regulations and exercised by him thereunder; and is reaffirmed by the President in Proclamation No. 3004. The restrictions of the 1952 act upon travel without a passport can be read intelligibly only in the light of the Secretary's long-recognized power to refuse a passport.

Shortly after the passage of the 1952 act the Secretary issued additional regulations to govern the issuance of passports.[58] This was done pursuant to Executive Order No. 7856, *supra*, which specifically provided that the Secretary may make rules additional to the rules contained therein, so long as they are not inconsistent therewith.

V

The regulations of the Department. The regulations which the Secretary promulgated[59] provide in substance that, in order that persons who support the world Communist movement may not through the use of United States passports further the purposes of that movement, no passport shall be issued to persons who are members of the Communist Party or to certain others who are believed to engage in activities which will advance that movement; that a person whose application is tentatively denied under the foregoing will be notified in writing,

[55] 22 C.F.R. § 53.1 (1949).

[56] *Supra* note 44.

[57] *Supra* note 45.

[58] 17 FED. REG. 8013 (1952); 22 C.F.R. §§ 51.135-51.143 (Supp. 1952).

[59] *Ibid.*

including notice of the reasons as specifically as security considerations permit; that such person will be entitled to present his case informally to the Passport Division and to appear before a hearing officer with counsel; and that if the decision is adverse it shall be in writing with reasons and the applicant shall be entitled to appeal to the Board of Passport Appeals, where he will be accorded a hearing with counsel. The regulations provide:[60]

> "*Oath or affirmation by applicant as to membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

The substantive part of the regulations[61] provides

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[60] 22 C.F.R. §51.142 (Supp. 1955).

[61] *Id.* § 51.135, reading in full text as follows:

"*Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion —not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement un-

that no passport shall be issued to certain described classes of persons. Roughly paraphrased those classes are (1) members of the Communist Party, (2) persons who have recently terminated Party membership under certain circumstances, (3) persons who support the Communist movement under certain circumstances, and (4) persons as to whom there is reason to believe they are going abroad for the purpose knowingly of advancing the Communist movement. We do not know from the record presently before us whether the Secretary would finally refuse a passport to Dr. Briehl if the matter were to progress to final decision, and we do not know in what proscribed class the Secretary might find Dr. Briehl upon the evidence before him if that evidence caused a refusal of the passport. And so we intimate no opinion upon the merits of Dr. Briehl's application; we have no opinion upon that subject. But, since we must determine the validity of the procedural provisions of the regulations, we face the validity of the underlying substantive provisions. We think those regulations[62] are valid as regulations.

The regulations in no way attempt to implement an unlimited discretion in the Secretary. They provide for peremptory denial of a passport under only one circumstance, admitted present membership in the Communist

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der such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

[62] *Ibid.*

Party (Sec. 51.142). Standards for denials upon other grounds are set up. That section of the regulations (51.135) obviously contemplates findings upon facts. It uses such terms as "under such circumstances as to warrant the conclusion"; "not otherwise rebutted by the evidence"; and "on the balance of all the evidence". Thus the regulations clearly require facts—revealed or unrevealed—and an evaluation of information. They do not provide for an unfettered discretion. Such provisions are the normal content of statutes or regulations which establish criteria for administrative action. Moreover, as we read the regulations, they refer to knowing associations with Communism.[63]

As we have pointed out, the Communist movement is, in the view of this Government, an aggressive conspiracy potentially dangerous to this country. Travel abroad by members of or adherents to the Communist movement is obviously an easy method of communication between such persons or organizations in this country and the prime sources of Communist policy and program in the Soviet Union and its satellites. Once a person with a passport is out of this country, this Government has no control over where he goes. His travel is controlled entirely by whatever countries he thereafter wishes to leave and to enter. The Department of State has authority to refuse to facilitate that communication.

In the second place, unless all the major foreign and fiscal policies of this Government, under two administrations of opposing political parties, have been a gigantic fraud, it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites. To that end the Secretary may refuse to permit an adherent of the Communist movement,

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[63] Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

clothed with American citizenship, from being present in places where he may readily create incidents or may assert statutory rights to activity on the part of this Government in his behalf. The Secretary may preclude potential matches from the international tinderbox.

As is recognized throughout this opinion, consistently with the other opinions of this court in this field,[64] the restrictions imposed by these regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights. And so the problem in the case is once more the familiar problem of balancing private right against public requirement.[65] Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under the regulation.

We therefore conclude that persons properly found to come within Section 51.135 of the Regulations are not illegally denied any constitutional right if they are refused passports.

It is suggested to us that, since the Internal Security Act of 1950[66] made certain provisions pertaining to passports to members of registered Communist organizations, it preempted the field and rendered null all other statutes and regulations relating to Communists and passports.

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[64] *E.g.*, Schachtman v. Dulles, *supra* note 37; Boudin v. Dulles, *infra;* Robeson v. Dulles, 98 U.S. App. D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895, 1 L.Ed.2d 86, 77 S.Ct. 131 (1956); Dulles v. Nathan, 96 U.S. App. D.C. 190, 225 F.2d 29 (1955).

[65] See American Communications Ass'n v. Douds, *supra*.

[66] Sec. 6, 64 STAT. 993, 50 U.S.C.A. § 785.

Such a conclusion would have to be an inference; we find no specific provision to that effect. We think the inference is not supportable. The 1950 act made it unlawful for a member of a registered Communist organization to apply for a passport or to use one, and made it unlawful for any officer or employee of the United States to issue a passport to such a member. It prescribed penalties up to $10,000 fine and five years' imprisonment for violation.[67] So the 1950 act relating to passports is a criminal statute. It applies to only a portion of the people to whom the Secretary's regulations apply, as is easily seen by reference to Section 51.135. Moreover the 1952 statute, making it a crime for any person to leave the country without a passport during an emergency, was passed after the 1950 act. The 1952 act continued in effect the system of travel control by passport denial employed since 1941. That fact compels the conclusion that the criminal sanctions of the 1950 act are in addition to, not to the exclusion of, that control. Passport regulations under the later act are not prohibited by the former. We think the 1950 act did not preempt the field in respect to passports and adherents to the Communist movement.

VI

The requirement for an affidavit. In the case at bar Dr. Briehl was advised in writing that it had been alleged he was a Communist. He was required to admit or deny that allegation under oath before the proceeding on his application went further. Dr. Briehl urges, as we have seen, that he is entitled to be confronted with witnesses and evidence sustaining the Secretary's suggestions of Communist affiliations. He says he is entitled to that revelation without first filing an affidavit in response to the suggestions. He says this is a requisite of due

[67] Sec. 15, 64 STAT. 1002, 50 U.S.C.A. § 794.

process. But our judicial process knows no such requirement. Our judicial process is that a party must plead before he is entitled to trial. There is nothing new or novel about that. Dr. Briehl says he is entitled to know his opponent's evidence before he pleads. Under the rules of civil procedure, if a defendant party does not plead, a default judgment is entered against him. We know of no reason why Dr. Briehl should not be required to admit or deny the Secretary's allegations before he gets an evidentiary hearing.

It is said that if Dr. Briehl should admit being a member of the Communist Party his application would thereupon promptly be denied, and therefore, it is said, no administrative remedy is really afforded him. But precisely the same thing happens to any party to a law suit. If he admits his opponent's allegations of fact he gets no evidentiary hearing; he gets an oral argument and perhaps a summary judgment against him. We know of no rule or doctrine that, if a party to a controversy admits adversary allegations of fact, the proceeding is void if no evidentiary hearing is thereafter afforded him. It is elementary that a party must raise an issue of fact in order to get a hearing on the facts.

In *National Council of American-Soviet Friendship* v. *Brownell*,[68] we held, citing several cases, that a party to an administrative proceeding could not default and still continue to litigate.

Moreover Dr. Briehl is an applicant. There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an appli-

[68] —— U.S. App. D.C. ——, 243 F. 2d 222 (1957).

cation for a passport should not be treated by the usual rules pertaining to applications. If Communist Party affiliations are pertinent to the Secretary's decision upon the possible consequences or complications of an applicant's presence in foreign countries or his roving about foreign areas in present world conditions, we see no reason why Communist affiliations should not be part of the data required by the application.

Dr. Briehl complains that the evidence in respect to the allegations asserted in the Secretary's advices to him may be in part confidential, and he argues that such possibility effectively nullifies the due process of the procedure. He seeks to bring the situation within the doctrine followed by the Ninth Circuit in *Parker* v. *Lester*,[69] that, if it be established in advance that a proffered administrative remedy will not afford due process, the remedy need not be pursued. It is true that a passport denial may be based upon confidential information. But due process of law is a term of variable content.[70] The necessity for secrecy in the conduct of foreign affairs has been asserted, seemingly without question, ever since President Washington refused to submit to the House of Representatives the documents relating to the Jay Treaty.[71] The Supreme Court said in the *Curtiss-Wright* case:[72]

> "The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive depart-

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[69] 227 F.2d 708 (1955).

[70] Moyer v. Peabody, 212 U.S. 78, 84, 53 L.Ed. 410, 29 S.Ct. 235 (1909); Communications Comm'n v. WJR, 337 U.S. 265, 275, 93 L.Ed. 1353, 69 S.Ct. 1097 (1949).

[71] See United States v. Curtiss-Wright Corp., *supra*, 299 U.S. at 320.

[72] *Id.* at 321.

> ments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."

And recognition of the necessity for secrecy in foreign affairs, coupled with a strong admonition to the judiciary against any attempts on its part to peer into or to unveil such confidential material, is contained in the Court's opinion in the *Chicago & Southern Air Lines* case, from which we have quoted. That case concerned the right of an American company to do business abroad. That was a right of the applicant if he could meet the appropriate specifications. But the Supreme Court specifically and emphatically pointed out that the President could deny the application for secret and confidential reasons. We know of no reason why an individual's right to travel abroad is to be treated by different constitutional standards than is his right to do business abroad. And we know of no reason why treatment of alleged Communist affiliation is to be put upon a preferred basis as compared with ordinary commercial infirmities or adverse suggestions.

Further justification for secrecy in a case of this type is supplied by the fact that the nation is in a state of national emergency, caused by the infiltration program of the Communist movement. During such an emergency cabinet officers may be forced to act on the basis of information the publication of which is inconsistent with national security. When the Secretary of State avows that in the interest of national security he cannot spread certain information on an open record, and explains with as much particularity as possible the reasons why he cannot do so, courts must rely upon his integrity and accept his statement.

We held in *Boudin* v. *Dulles*[73] that, where a passport has been denied by the Secretary on the authority of a specific regulation, he (the Secretary) must make findings in writing responsive to the requirements of that regulation, and in such a case must state whether the findings are based on evidence openly produced or on secret information and, if the latter, "should explain with such particularity as in his judgment the circumstances permit the nature of the reasons why such information may not be disclosed." We adhere to that ruling. We are of the view that due process in passport proceedings does not prevent the use of confidential information when foreign affairs or the national security is involved.

In summary on this point we are of opinion that, if a person falls within one of the classes described in the regulations, the Secretary may refuse him a passport; and it follows that, if it be alleged he is in one of those classes and he refuses to admit or deny the allegation, the passport may be refused.

From the foregoing basic considerations some conclusions are easily reached. We summarize. In the deliberate judgment of this Government the Communist movement is today a conspiracy for world domination sufficiently threatening to the security of this nation to justify the expenditure of billions of dollars every year to thwart its ambitions. Limitations and prohibitions upon leaving one's country and traveling abroad have been enforced in periods of stress since time immemorial. It would be idle, if not ridiculous, in view of the absorption of the whole world in the problem of the Communist program and of the extent of the attention and activity of our own Government in that respect, for any court to say the present is not a period of stress in international affairs.

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[73] 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).

The present limitations upon travel effectuated by passport control are authorized by statute and by presidential proclamation. They are, as we said in *Shachtman v. Dulles*,[7] an impingement upon a natural right of a citizen to travel. But no right, even the right to life, is absolute, and so the inquiry must be whether the impingement is valid. Executive action in the field of foreign affairs has been clothed in secrecy since the foundation of the Republic, and the Supreme Court has invariably protected that secrecy and repeatedly warned the judiciary not to invade that realm of executive prerogative. The rule has been applied by the Court even where the matter involved was transportation over international routes. Requirements that one admit or deny an adversary's allegations of fact before the right to an evidentiary hearing arises are elementary in judicial process; *a fortiori* in quasi-judicial process. And requirements that an applicant for a permit submit prescribed pertinent data as a prerequisite to consideration of his application are usual and valid in administrative procedure.

Analyzed to its underlying elements the critical problem in the case before us is simply whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party. We think he may. Or to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions. We think it is.

We are of opinion that the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them. The judgment of the District Court, granting the Secretary's motion for summary judgment is

Affirmed.

WASHINGTON, *Circuit Judge*, concurring in the result:

The record discloses a "tentative" refusal by the Passport Office to renew Dr. Briehl's passport, and an official determination by that Office not to render a final decision on the matter because of Dr. Briehl's refusal at his hearing to furnish an affidavit, as provided for in Section 51.142 of the Passport Regulations, "with respect to present or past membership in the Communist Party." Unlike the applicant in *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810, cert. denied, 352 U.S. 895 (1956), the appellant in this case has pursued the administrative and judicial steps open to him to raise the question whether the Secretary of State may validly require such an affidavit as a condition precedent to the rendering of a final decision. That question must now be decided.

The Secretary seeks to uphold his power to elicit information as to Communist Party membership as a procedure incident to the substantive power to restrict foreign travel through passport denial. Affidavit requirements of this sort are ordinarily valid if the information elicited is relevant to the exercise of a valid power. *Cf. Garner* v. *Board of Public Works*, 341 U.S. 716 (1951).[1] Implicit in the decisions of this court is the holding that the Secretary possesses a substantial measure of authority to restrict travel by passport denial.[2]

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[1] When the Supreme Court in *Garner* determined that the state agency may properly elicit from city employees information "that may prove relevant to their fitness and suitability for the public service," 341 U.S. at 720, it apparently assumed the proposition that the state agency had power to bar from employment those who are *not* fit or suitable for the public service.

[2] See Shachtman v. Dulles, 96 U.S.App.D.C. 287, 225 F.2d 938 (1955); Boudin v. Dulles, 98 U.S.App.D.C. 305, 235 F.2d 532 (1956); Dayton v. Dulles, 99 U.S.App.D.C.

While the precise extent of that authority is still in process of being defined, Congress has not been silent or inactive. In the 1941 travel control statute, 8 U.S.C. § 1185, Congress provided, in substance, that when the President has proclaimed a national emergency and when he has found that the interests of the United States require additional restrictions on the departure of persons from the United States, it shall be unlawful for a citizen to leave the country without a valid passport. As Judge Prettyman points out, this statute has become operative. I read it as having been intended to authorize the Secretary to control, by passport denial, the travel of those whose journeying abroad is reasonably found to be contrary to the interests of the United States.

In the Internal Security Act of 1950, Congress made the following legislative finding, whose validity today can hardly be subject to challenge:

> "Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." 50 U.S.C. § 781(8) (1952).

Congress implemented that finding by Section 6 of the Internal Security Act, 50 U.S.C. § 785 (1952), a provision which the framers of the Act no doubt thought would come into effect at a much earlier date than in fact has proved possible. But the congressional finding remains as an admonition to the executive branch to use

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taken by Judge Bazelon in his learned dissent is opposed to the spirit if not the letter of these decisions. But it may be agreed that further congressional action in the passport field would be very desirable.

its authority in all lawful ways to control the "travel of Communist members, representatives, and agents" so as not to facilitate communication or otherwise "further the purposes of the Communist movement." Therefore, I have no doubt that the Secretary has the power—in some cases at least—to deny passports on grounds to which past or present membership in the Communist Party "may prove relevant." *Garner*, *supra* at 729.

It must be admitted, I think, that the affidavit requirement does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment.[3] But if the interests of the public are also involved, the problem is "to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *American Communications Ass'n* v. *Douds*, *supra*, at 399. The information as to Communist Party membership is asked for in connection with a passport application and might prove relevant to a valid denial of a passport. Under all the circumstances, it seems clear that the benefit to the public order, in having information of this sort available to the Secretary to enable him to exercise his lawful authority, substantially outbalances any abridgement of individual interests that may result. As Mr. Justice Murphy observed, concurring in *Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943): "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, *except insofar as essential operations of government require it for the preservation of an orderly society*, —as in the case of compulsion to give evidence in court." (Emphasis supplied.) In the exercise of his powers over

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[3] See American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); see also United States v. Rumely, 345 U.S. 41, 56 (1953).

the granting or withholding of passports, the Secretary is similarly entitled to relevant information.

For these reasons, I find no infirmity in the statutory and regulatory system which authorizes the Secretary to withhold a passport from any person who, by refusing to furnish the required affidavit, fails to complete his application.[4] Appellant has not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having—like the present one—the force of law.[5] Surely if a person desiring to vote declines to answer a question which may prove relevant to a valid ground of denial—such as his age, or where and when he last voted—an election board may thereupon refuse to permit him to vote until the question is answered, and need not make a considered determination that in fact he is ineligible. And even if the decision to deny a right could be said to require an exercise of discretion, I do not see why the decision-

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[4] 22 U.S.C. § 213 (1952) requires every passport applicant to furnish under oath an application containing "a true recital of each and every matter of fact which may be required by law or by any rules authorized by law." See also 22 C.F.R. 51.14. Section 51.142 of the regulations authorizes the affidavit, and Section 51.71 specifies that the affidavit "shall be considered as, and become, a part of the application."

[5] The thrust of appellant's argument is that the issuance of a passport is being unlawfully conditioned upon the requirement of a "test oath." But as the Supreme Court pointed out in *Garner, supra*, entirely different issues are raised by a requirement that certain conduct or affiliation be denied under oath, and by a requirement that information "with respect to" a stated subject matter be given.

maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

It is important to bear in mind the distinction, which the Supreme Court pointed out in *Konigsberg* v. *The State Bar of California*, 353 U.S. 252 (1957), between the two courses of governmental action that can follow a refusal to answer a particular question propounded by a government agency. In *Konigsberg*, an adverse inference was drawn from a refusal to answer, and governmental action—denial of bar membership—was based in part on this inference. The Court held the inference to be unreasonable, since the refusal appeared to be based on a good faith reliance on a constitutional privilege and therefore would not necessarily give rise to the adverse inference which the State had drawn. On the other hand, in the case at bar, no adverse inference was drawn from a refusal to answer. Here the government agency asserted its right to have certain information which was relevant to the exercise of valid authority, and declared in advance that it would not proceed until the information was forthcoming. This is precisely the sort of situation which the Court in *Konigsberg* contrasted with the inference-drawing approach that had been used there. As to this situation, the Court indicated that a serious First Amendment question would be raised, as has been recognized in this opinion, and that there would be a question of fairness if the applicant were not warned of the consequence of failure to answer. Here the regulations plainly indicate the result of a refusal to answer.

At this stage we are concerned only with a request for identification of affiliation *vel non*, unaccompanied by any direct penalty stemming from such identification. "No doubt issues like those now before us cannot be completely

severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision." *American Communications Ass'n* v. *Douds*, *supra*, at 416 (Frankfurter, J., concurring in part). The question whether past or present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership.[6]

It is also unnecessary and inappropriate for us to decide such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always hold a hearing, and the like. We need not in the present case attempt fully to define the scope of the Secretary's power, or that of the courts. We should do no more than decide the question actually before us.

BAZELON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, concurs, dissenting: The Secretary of State says his regulations, pursuant to which he denies passports to persons who "support the Communist movement," are a valid exercise of discretion delegated to him by the President. I think they are invalid because (1) the President did not undertake to delegate the discretion

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[6] See Garner, *supra* at 720: "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party . . . . *Not before us is the question whether* the city may determine that an employee's *disclosure* of such political affiliation *justifies his discharge*." (Emphasis supplied.)

the Secretary claims and (2) the President himself did not have this discretion.

For many years the Secretary of State has claimed an unlimited discretion to deny passports.[1] During the greater part of our history, when a passport was merely a comfort to the traveller but not a necessity,[2] his claim went unchallenged. Since 1941, however, a passport has been a travel necessity,[3] and when the Secretary began denying or revoking passports on such grounds as "activities contrary to the best interests of the United States," or Communist membership or support, applicants turned to the courts for relief.[4]

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[1] See 3 Hackworth, DIGEST OF INTERNATIONAL LAW § 268 (1942).

[2] *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 289-90, 225 F.2d 938, 940-41 (1955).

[3] Actually the first requirement of a passport for travel was during World War I. Act of May 22, 1918, 40 STAT. 559, Proclamation No. 1473, Aug. 8, 1918, 40 STAT. 1829. These controls expired March 3, 1921. PUB.RES.No. 64, 41 STAT. 1359. By Act of June 21, 1941, 55 STAT. 252, Congress amended the 1918 Act to apply during a proclaimed emergency and, on November 14, 1941, the President issued Proclamation No. 2523, 55 STAT. 1696, restoring travel controls which have remained in effect since then. The 1941 statute was replaced by § 215 of the Immigration and Nationality Act of 1952, 66 STAT. 190, 8 U.S.C. § 1185, and on January 17, 1953, the revised statutory authority was invoked by Proclamation No. 3004, 67 STAT. c. 631.

In addition to being legally required as an exit permit, a passport has become a practical necessity because foreign countries have increasingly been requiring it as a condition to entry. See *Shachtman* v. *Dulles*, 96 U.S.App.D.C. at 290, 225 F.2d at 941; *Bauer* v. *Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952); Comment, 61 YALE L.J., *infra* note 28, at 171-72.

[4] See, for example, *Bauer* v. *Acheson*, *supra* note 3; *Dulles* v. *Nathan*, 96 U.S.App.D.C. 190, 225 F.2d 29 (1955);

Bauer v. *Acheson*, 106 F.Supp. 445 (D.D.C. 1952), was the first reported case. There the Secretary based his authority on the President's inherent foreign relations power, and on the provision of 22 U.S.C. § 211a that the Secretary "*may* grant . . . passports . . . under such rules as the President shall designate and prescribe . . . ." The court held there was no authority to refuse or revoke a passport without notice and hearing. Less than two months later and presumably as a result of that decision, the Secretary promulgated the regulations now before us, declaring Communist supporters ineligible for passports and establishing a notice and hearing procedure.[5] *Until then, the only substantive passport qualification ever imposed by any statute*[6] *or regulation was citizenship.*[7]

Shachtman v. *Dulles*, *supra* note 2; *Boudin* v. *Dulles*, 98 U.S. App.D.C. 305, 235 F.2d 532 (1956); *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895 (1956); *Dayton* v. *Dulles*, 99 U.S.App.D.C. 47, 237 F.2d 43 (1956).

[5] 17 FED.REG. 8013, Sept. 4, 1952, 22 C.F.R. §§ 51.135-51.143 (1957 Supp.).

[6] Section 6 of the Internal Security Act of 1950, 64 STAT. 993, 50 U.S.C. § 785, which makes it a crime for a "member of a [Communist] organization" to apply for or use a passport, is inoperative until such an organization has registered or been finally ordered to do so. Neither of these events has occurred. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), *reversing*, 96 U.S. App.D.C. 66, 223 F.2d 531 (1954).

[7] The Act of May 30, 1866, 14 STAT. 54, disqualified non-citizens. By Act of June 14, 1902, 32 STAT. 386, the law was amended to disqualify persons not owing allegiance to the United States, "whether citizens or not." The amendment was designed to cover citizens of Puerto Rico, Hawaii, and the Philippines. 35 CONG.REC. 5697-99, 6588-89, 57th Cong., 1st Sess. (1902). The statute is now codified as 22 U.S.C. § 212. For convenience, the class of eligibles will be referred to herein as "citizens."

As authority for his new regulations, the Secretary relied on 22 U.S.C. § 211a,[8] the same statute he had relied on in *Bauer*. He continued this reliance in later cases. In the present case he says: "In the light of the broad language of this statute, there is no occasion here to determine whether the President's plenary executive power over foreign affairs in itself furnishes sufficient authority to the Secretary to deny passports to American citizens in accordance with the reasonable standards prescribed by him."[9] But he adds that "if some additional source of authority were needed, it is supplied by the travel control statutes which Congress has repeatedly enacted";[10] and "the language of the [travel control] statute makes it plain that during [a proclaimed emergency] this authorization becomes incorporated, in effect, into § 211a itself."

But in *Stewart v. Dulles*, Nos. 13533, 13622 and 13638, briefed and argued after the present case and now awaiting decision, the Secretary conceded that § 211a "confers no substantive power," and he "assume[d]" that he "had no authority to impose this kind of direct restraint upon travel." "It was for this very reason," he said, "that Congress enacted what is now 8 U.S.C. § 1185, authorizing the President, in times of war or national emergency, to use his inherent powers in the field of passport issuance as a means of directly controlling the travel of citizens." The argument now is that (1) 22 U.S.C. § 211a and the inherent executive power, though ineffective to control travel, give the Secretary discretion as to

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[8] 22 C.F.R. p. 98 (1957 Supp.); 17 FED.REG. 8013.

[9] See also the Secretary's brief in *Boudin v. Dulles*, *supra* note 4, at p. 16.

[10] *Supra* note 3.

passport issuance; and (2) under 8 U.S.C. § 1185, upon proclamation of an emergency by the President, any person to whom the Secretary, in his discretion, refuses a passport, may not leave the country. Thus, the Secretary claims that Congress has delegated to him, through the President, the power to establish categories of persons ineligible to leave the country.

I.

The Claimed Delegation

The authority conferred on the President by 22 U.S.C. § 211a was exercised through Executive Order No. 7856, on March 31, 1938.[11] The Executive Order designated only one general category of passport eligibility, that created by 22 U.S.C. § 212, namely, persons who are citizens of the United States. 22 C.F.R. § 51.2 (1949). Beyond that, the order confined itself to specifying the formal requirements of the passport application (*e.g.*, the type and size of photographs to be attached), *id.*, § 51.23q, and the evidence of citizenship to be furnished, and providing for amendment, renewal and extension of passports and specifying the fees to be collected. In addition, it authorized the Secretary of State, "in his discretion to refuse to issue a passport . . ." and "to make regulations . . . additional to the rules in this part and not inconsistent therewith." *Id.*, §§ 51.75, 51.77. Pursuant to this latter authority, the Secretary, on the day of the President's order, issued Departmental Order 749, promulgating the Department's regulations, consisting merely of procedural implementation of the President's rules.[12]

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[11] 3 FED.REG. 799, 22 C.F.R. §§ 51.1 - 51.77 (1949).

[12] 22 C.F.R. §§ 51.101 - 51.134 (1949); and see source note at p. 103. "A study of the executive order and the depart-

The regulations in question in the present case, which the Secretary added four years later and after the *Bauer* decision, were the first attempt, by regulations issued under 22 U.S.C. § 211a, to affect anything more than procedure or form.[13] In view of the purely procedural nature of the President's rules, his accompanying grant to the Secretary of authority to make "additional . . . and not inconsistent" regulations confers no power to create substantive disqualifications.

Nor did the President's Proclamation No. 3004,[14] making operative the travel control provision of 8 U.S.C. § 1185, give the Secretary this authority. Section 1185 prohibits departure from the United States without a valid passport during a proclaimed emergency, "except as otherwise provided by the President, and subject to such limitations as the President may authorize and prescribe . . . ." When the proclamation was issued, regulations existing under an earlier proclamation were in force, providing generally that no person could enter or leave the country without a valid passport, except for travel to and from certain countries. 22 C.F.R. §§ 53.1-53.9 (1949). Proclamation No. 3004 did not undertake to grant power to the Secretary to control travel by establishing additional categories of passport ineligibility. It merely declared that "departure and entry would be sub-

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mental order indicates that the chief element in the discretion exercised by the Secretary of State concerned the type of proof required to establish citizenship or allegiance." Note, 41 GEO.L.J., *infra* note 28, at 76.

[13] See Department of State, THE AMERICAN PASSPORT, ch. IV (1898); Exec. Order No. 654, June 13, 1907; Exec. Order No. 4359-A, Dec. 19, 1925; Exec. Order No. 4382-A, Feb. 12, 1926; Exec. Order No. 4488, Aug. 3, 1926; Exec. Order No. 5860, June 22, 1932; Exec. Order No. 6650, March 23, 1934.

[14] *Supra* note 3.

ject to the already *established travel control regulations, 22 C.F.R. §§ 53.1-53.9, referring to them specifically and incorporating them into the proclamation.*[15] It added an authorization to the Secretary "to revoke, modify or amend such regulations as he may find the interests of the United States to require." This authorization, like the authorization of Executive Order No. 7856 to issue "additional" *passport* regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

Thus neither Executive Order No. 7856, which confers upon the Secretary authority received by the President under 22 U.S.C. § 211a, nor Proclamation No. 3004, which confers upon the Secretary authority the President holds under 8 U.S.C. § 1185, undertakes to delegate to the Secretary any power to create substantive passport disqualifications.

Nor could the President delegate such power; for neither statute conferred it upon him.

II.

The President's Statutory Power

A. The Passport Statutes Do Not Purport to Confer the Power Here Claimed.

Section 211a of 22 U.S.C. says nothing about categories of ineligibility. Indeed, the Secretary concedes that the

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[15] The regulations involved in this case, which were also in existence when the proclamation was issued, were not referred to directly or indirectly.

purpose of the Act of August 18, 1856,[16] from which § 211a derives, was to prohibit passport issuance by anyone other than the Secretary of State. Nothing in the legislative history of the 1856 statute suggests that the words "may grant and issue" confer power to set up substantive categories of ineligibility. From the little that history reveals, it appears that the purpose of Congress was merely to control the procedure of passport issuance.[17] Fairly read § 211a grants the Executive only such discretion as may be necessary for elaborating a procedure for issuing passports, *e.g.*, as to the type and quantum of evidence of citizenship.[18] And so the statute was read by our Presidents in former times.[19]

Nor did 8 U.S.C. § 1185 authorize the President to create such substantive passport disqualifications as are contained in the regulations before us. Subsection (a) of § 1185 did not purport to give the President power to establish criteria for restricting anyone's right to travel. It merely authorized him to invoke restrictions set forth in the statute if he found that "those provided otherwise than by this section" were inadequate to protect the public safety. Moreover, when the Act was first adopted in 1918 and when it was reenacted in 1941,[20] there were no restrictions on citizens' travel "provided otherwise than

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[16] 11 STAT. 60; reenacted in substantially the same form by the Act of July 3, 1926, c. 772, § 1, 44 STAT. 887. The language of the original act was "shall be authorized to grant" rather than "may grant," but the effect is the same.

[17] Comment, 23 U.CHI.L.REV., *infra* note 28, at 272 n. 25; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A.B.A.J. 307, 308 (1957).

[18] The original 1856 Act; 11 STAT. 60, combined the present § 211a with the present § 212 which disqualifies noncitizens.

[19] *Supra* note 13.

[20] *Supra* note 3.

or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." 15 STAT. 223-224 (1868), R.S. § 1999, 8 U.S.C. § 800 (1940).[21] Although designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress "is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U.S. 491, 498 n. 11 (1950).[22] The Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 "are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed." *Id.* at 498-99. That same light, I think, illuminates 22 U.S.C. § 211a and 8 U.S.C. § 1185. Since expatriation is today impossible without leaving the country,[23] the policy expressed by Congress in 1868 and never repealed precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving. The Secretary's construction of the statutes would impinge also upon the Internal Security Act of 1950.[24] Congress there made it unlawful for a member of a Communist organization to apply for or use a passport, but only after such organization has registered under the Act or has been finally ordered to do so. Neither of those events has occurred.[25] Moreover, the prohibition was

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[21] This act, though no longer included in the United States Code, has not been repealed and is still in effect. *Savorgnan* v. *United States*, 338 U.S. 491, 498-99 (1950).

[22] See also *op.cit. supra* note 1, p. 163.

[23] 8 U.S.C. §§ 1481 and 1483 (1952); *Savorgnan* v. *United States*, 338 U.S. at 503.

[24] *Supra* note 6.

[25] *Ibid.*

by this section." What Congress had in mind, therefore, in § 1185(a), was the problem of movements of *aliens*, not citizens. And Congress set forth, in subparagraphs (1) through (7) of subsection (a), a system of exit and entry permits to control movements of aliens.

It is subsection (b) of § 1185 which is relevant to citizens. That subsection provided that, upon issuance of the President's proclamation, "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States, unless he have a valid passport." Thus citizens were forbidden to travel without passports, but the President was authorized to establish conditions and exceptions to this prohibition. But the subsection did not authorize the President to decide which categories of citizens might receive passports.

Though neither 22 U.S.C. § 211a nor 8 U.S.C. § 1185 explicitly confers the authority the Secretary claims, he urges us to read them through a wide lens and find in them a congressional intent to authorize his regulations. His contention comes to this, that Congress has by implication, though not expressly, authorized the Executive to decide which Americans shall be confined within our boundaries. In my opinion such an intention may not be read into the statutes because (1) it would conflict with other expressions of congressional policy and (2) it would raise grave constitutional doubts.

B. The Secretary's Reading of the Statutes Conflicts with Congressional Policy.

Almost a century ago, Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and decreed that "any declaration, instruction, opinion, order,

circumscribed by procedural safeguards not found in the Secretary's "Communist supporter" regulations involved here; and it was substantively limited to "members" of the proscribed organization, whereas the Secretary's regulations apply "regardless of the formal state of [the applicant's] affiliation with the Communist party . . ." [26] These declarations of congressional policy make it unlikely that by other statutes Congress intended to authorize a different policy.[27] "The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing and analysis." Davis, ADMINISTRATIVE LAW 57 (1951).

I would not construe the statutes as conferring upon the Secretary by implication broad powers which they do not explicitly confer, *United States* v. *Minker*, 350 U.S. 179, 190 (1956), especially when serious restraints on liberty are entailed. *Ex parte Endo*, 323 U.S. 283, 299-300 (1944).

C. The Secretary's Reading of the Passport Statutes Is Constitutionally Doubtful.

The broad construction the Secretary would have us place on the passport statutes would raise grave constitutional doubts.[28] Statutes must be construed narrowly

[26] In the last session of Congress, legislation was introduced by Representative Walter, which would have amended the Administrative Procedure Act to provide for a passport review procedure and would have denied passports to persons under Communist discipline in much the fashion now employed by the State Department. The bill died in committee. H.R. 9991, 102 CONG.REC. 1266, 84th Cong., 2d Sess., March 15, 1956.

[27] See Note, 41 GEO.L.J., *infra* note 28, at 89.

[28] Comment, *The Passport Puzzle*, 23 U.CHI.L.REV. 260

if to do so avoids a serious constitutional questio
United States v. *Rumely*, 345 U.S. 41, 46 (1953); *Unite*
States v. *Witkovich*, 25 U.S.L. WEEK 4266, 4269, April 3
1957.

We recognized in *Shachtman* that the individual's righ
to travel is a natural right protected by the Constitu
tion.[29] Since denial of a passport now abridges tha
right, pasport applicants are entitled to both the pro
cedural[30] and substantive[31] safeguards of the Fifth
Amendment. The broad interpretation urged by the
Secretary would require us to decide whether it is con-
sistent with due process of law, and with First Amend-
ment rights,[32] to deprive an individual of so large a part

(1956); Note, *Passports and Freedom of Travel: The Con-*
flict of a Right and a Privilege, 41 GEO.L.J. 63, 88 (1952);
Note, *"Passport Denied": State Department Practice and*
Due Process, 3 STAN.L.REV. 312 (1951); Parker, *The Right*
to Go Abroad: To Have and to Hold a Passport, 40 VA.L.
REV. 853, 870 (1954); *Passport Refusals for Political Rea-*
sons: Constitutional Issues and Judicial Review, 61 YALE
L.J. 171 (1952).

[29] 96 U.S.App.D.C. at 290, 225 F.2d at 941. See also *Wil-*
liams v. *Fears*, 179 U.S. 270, 274 (1900), referring to "free-
dom of egress from the State."

[30] *Dayton* v. *Dulles*, *supra* note 4; *Boudin* v. *Dulles*, *supra*
note 4; *Bauer* v. *Acheson*, *supra* note 3; see also *Dulles* v.
Nathan, *supra* note 4, remanding *Nathan* v. *Dulles*, 129
F.Supp. 951 (D.D.C. 1955); for vacation of judgment and
dismissal of complaint on ground of mootness.

[31] *Shachtman* v. *Dulles*, *supra* note 2; see *Kraus* v. *Dulles*,
98 U.S.App.D.C. 343, 235 F.2d 840 (1956).

[32] In saying in the *Communist Party* case "that the Gov-
ernment may validly decline" a passport to a Communist,
this court was referring to the passport in its aspect as a
documentary assurance of "the protection and good offices of
American diplomatic and consular officers abroad," 96 U.S.
App.D.C. 66, 90, 223 F.2d 531, 555 (1954), and not as an
exit permit indispensable to travel. As for the latter aspect

of his liberty under the standards and procedures the Secretary employs; and whether, if Congress possesses such power, it may validly delegate to the Secretary or the President a "discretion . . . unconfined and vagrant . . . [not] canalized within banks that keep it from overflowing." [33]

The word "Communist" is not an incantation subverting at a stroke our Constitution and all our cherished liberties. If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist,[34] tomorrow the same logic,

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of a passport, *i.e.*, whether a restriction upon liberty to travel is constitutional, the court said, ". . . we need not, and do not, enter upon consideration of that question . . . ." 96 U.S.App.D.C. at 91, 223 F.2d at 556. Later in *Shachtman*, the court did consider that question and concluded, as we have already seen, that there is a constitutionally protected right, *supra* note 29; but how much protection springs from the First Amendment has not been determined.

[33] Mr. Justice Cardozo dissenting in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440 (1935). The Secretary argues that standardless delegation is not invalid in a field where the Executive possesses inherent power, citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). As I shall show, however, the delegation problem cannot thus be avoided, for the authority here claimed is not encompassed within the President's inherent power in the field of foreign relations.

[34] The majority finds "nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath." But the analogy sought to be established founders upon the hard fact that the passport applicant does not seek a permit or a license—he seeks to implement a constitutionally protected *right*. The requirement of the affidavit is also sought to be defended by analogy to ordinary pleading rules. But this analogy also collapses. Pleadings may be in the alternative; they may be inconsistent or hypothetical; they are not under oath. A defendant is not required to submit to a test oath as a qualification of his right to receive justice.

will justify control of movement from one state to another, for that is no less useful in communication than travel abroad. By no great extension of the court's reasoning, an oath can be required as a condition to the enjoyment of every other right we have. Food, clothing, shelter, education, recreation—all help to sustain the individual, develop his powers, and make him a more dangerous antagonist.

The due process problem is not avoided by reliance upon *Galvan* v. *Press*, 347 U.S. 522 (1954); nor the First Amendment problem by reliance upon *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

In holding in *Galvan* that Congress could constitutionally provide for deportation of an alien who becomes a Communist after entry, the Supreme Court said: "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."[35] The greater power which the Government possesses in respect of aliens[36] may legitimatize treatment which could not lawfully be directed against citizens. *Galvan* provides no constitutional basis for banishing a *citizen* who becomes a Communist.

So far as the First Amendment problem is concerned, whether we apply the "clear and present danger test,"[37] or some aspect of the "reasonable relation" test,[38] we are engaged in weighing the individual's need to be free against the Government's need to restrain him. Each case is bound to turn on the nature of the freedom involved, the

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[35] 347 U.S. at 530.

[36] See discussion at note 90 *infra* and related text.

[37] *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

[38] *Dennis* v. *United States*, 341 U.S. 494, 510 (1951), adopting the statement of Chief Judge Hand below, *United States* v. *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

public detriment it conflicts with and the type of restraint imposed. It is unlikely that a case arising in one context will determine a case arising in another. *Douds* falls far short of determining our present problem.

In *Douds* the Court upheld the constitutionality of § 9(h) of the National Labor Relations Act, withdrawing N.L.R.B. privileges from unions whose officers fail to submit non-Communist affidavits. The Court found that, since unions are clothed by Federal law with great powers for good or evil, "the public interest in the good faith exercise of that power is very great." 339 U.S. at 401-02. It observed that (1) "§ 9(h) touches a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint," *id.* at 404; (2) there is no constitutional right to occupy the position of a labor leader in the sense that "the loss of [the] particular position [would be] the loss of life or liberty," *id.* at 409; (3) § 9(h) imposes no direct restraint on freedom of belief or association, since its "discouragements" operate "only against the combination of [particular] affiliations or beliefs with occupancy of a position of great power over the economy of the country," *id.* at 403-04;[39] and (4) § 9(h), if not complied with, makes it not impossible, but only more difficult, for unions to remain effective, *id.* at 390.[40]

Whether travel by Communists is a danger on a par with their occupancy of powerful union offices is at least questionable. Prevention of travel does not prevent communication. Conspirators could still use the mails, cables, telephones, radio and, not least, foreign embassies and consulates in the United States. The discomfiture of a

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[39] See also the concurring opinion of Mr. Justice Jackson.

[40] That some unions have remained powerful and effective without the privileges of the Labor Relations Act is common knowledge.

few individuals who would have to send messages rather than make speeches[41] may not, in the constitutional balancing process, outweigh the citizen's right to travel. On the other side of the scales, it appears that (1) the passport statutes, unlike that in *Douds*, touch not a handful of persons, but many thousands (in the Secretary's view, as many thousands as he may choose to suspect); (2) unlike the statute in *Douds*, these involve a constitutionally protected right to travel; (3) they not only impose what *Douds* called an *indirect* restraint on First Amendment rights by "discouragement" of freedom of belief and association, but also *directly* affect the right to travel which may itself be a First Amendment right;[42] and (4) these statutes make travel not difficult, but impossible.

If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political taste, they are the very type of legislation the First Amendment forbids. *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Near* v. *Minnesota*, 283 U.S. 697 (1931).[43] If the statutes bar travel on account of "political affiliations and beliefs," they are expressly condemned in *Douds*: "[such] circumstances

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[41] One of the individuals who has sought in vain for many years to go abroad was recently reported to have sent a "cordial message of greetings" to the Soviet Union which was published in the Communist Party newspaper PRAVDA, and broadcast by the Moscow radio. N.Y. TIMES, Jan. 2, 1957, p. 16, col. 6. "Spies and traitors do not usually travel abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have amply demonstrated." Parker, *op.cit. supra* note 28 at 873.

[42] Wyzanski, *Freedom to Travel*, THE ATLANTIC MONTHLY, Oct. 1952, 66, 68.

[43] *Ibid.*

[are] ordinarily irrelevant to permissible subjects of government action." 339 U.S. at 391. It is most frequently argued, in justification of the power the Secretary claims, that travel of Communists may serve to promote an international conspiracy. Whether, under the *Douds*[44] reasoning, that possibility justifies these regulations and puts to rest the constitutional doubts that arise is open to serious question.

Another alleged reason for abrogating the constitutional right to travel is that the American abroad may not only talk, but may also act in ways that conflict with our policies and interests and tend to cause international incidents. The Secretary of State embodies that reason in § 51.136 of his regulations,[45] which is not invoked in this case.

During a recent visit to the United States by a foreign chief of state at the invitation of the President, an American mayor declared that the guest was unwelcome in his city. That announcement could hardly have been more prejudicial to our foreign relations if the mayor had been abroad when he made it. Yet no one has suggested that he could constitutionally have been prevented from making his announcement. At home our citizens are as free to do lawful acts as they are to speak their minds.

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[44] See also *Communist Party* v. *Subversive Activities Control Board, supra* note 32.

[45] "*Limitations on issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 C.F.R. § 51.136 (Supp. 1957).

The expectation that they may do things abroad which violate no laws is, I think, an insufficient basis for abrogating their right to leave the country.

If it is the fear of *illegal* conduct which purportedly justifies travel restriction, a factor which may tip the constitutional scale is "the availability of more moderate controls than those which the state has imposed." Mr. Justice Frankfurter, concurring in *Dennis* v. *United States*, 341 U.S. 494, 542 (1951), quoting Freund, ON UNDERSTANDING THE SUPREME COURT. There are penal sanctions against the commission or the attempt or conspiracy to commit espionage, sabotage, treason, sedition and subversion.[46] The Internal Security Act deals with conspiracies to do anything which would substantially contribute to the establishment of a foreign-directed totalitarian dictatorship.[47] For persons who become or remain members of the Communist Party with knowledge of its violent objectives, we have the Communist Control Act of 1954.[48] We have statutes dealing with persons who act as agents of a foreign government,[49] or those who have "correspondence" with a foreign government with intent to influence its measures in relation to disputes or controversies with our Government, or to defeat the measures of the United States.[50] Our law even prohibits leaving the country with intent to avoid prosecution or punishment for certain listed offenses, or to avoid giving testimony in certain criminal proceedings.[51] In that they re-

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[46] 18 U.S.C. §§ 371, 791-97, 2151-56, 2381-90.

[47] 50 U.S.C. § 783.

[48] *Id.*, § 843.

[49] 18 U.S.C. § 951.

[50] *Id.*, § 953.

[51] *Id.*, § 1073.

quire proof of criminality and provide trial by jury, these statutes, despite their severe penalties, are more moderate controls than those the Secretary imposes. He claims that the peril involved in the possible machinations of such persons would justify a statute permitting him to deprive them of the right to travel even though he has no evidence which would justify prosecuting them under any of the penal statutes. I think it very doubtful that a statute could constitutionally grant the power to confine citizens to the country in such circumstances.[52]

Section 1732 of 22 U.S.C. (Supp. 1956) calls upon the

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[52] It has been observed that, since the common law attributes to personal liberty, according to Blackstone, "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct," "the distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree." Comment, 61 YALE L.J. *supra* note 28, at 190; see also Doman, *op.cit.supra* note 17 at 310.

Constitutional safeguards are "especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed." Mr. Justice Jackson, dissenting in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 225 (1953). In other legal systems, as Mr. Justice Jackson points out, other considerations may govern. He cites the testimony of Herman Göring at the Nuremburg trials:

> ". . . those who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody, and these were the people who were taken to concentration camps. . . . Likewise, if for political reasons, . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." *Id.* at 225-26 n. 8.

President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The majority says that since "an American with Communist affiliations" who gets into trouble abroad through his "political indiscretion" may invoke this statute, the Secretary of State must have the power to prevent the citizen from going abroad. But the American who becomes embroiled with foreign authorities can only request the aid of his Government; he cannot compel it. *United States ex rel. Keefe* v. *Dulles*, 94 U.S. App.D.C. 381, 384-85, 222 F.2d 390, 393-94 (1954), *cert. denied*, 348 U.S. 952 (1955).

That the purported need to confine citizens to the country is claimed to spring from emergency conditions does not dispense with their constitutional rights.[53] Mr. Justice Jackson pointed out in his concurring opinion in *Youngstown Sheet & Tube Corp.* v. *Sawyer*, 343 U.S. 579, 649-50 (1952):

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emer-

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[53] The Emergency Detention Act of 1950 (Title II of the Internal Security Act), to deal with "fifth column" problems, authorizes the President, in time of invasion, declared state of war or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend and detain persons as to whom there is reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812, 813, 64 STAT. 1021 (1950). The original bill, S. 4130, 81st Cong., 2d Sess. (1950), had contained provisions authorizing detention during such "cold war" emergencies as an "imminent invasion" or a congressionally declared emergency, but these provisions were eliminated because of doubtful constitutionality. Note, *The Internal Security Act of 1950*, 51 COL.L.REV. 606, 651 (1951).

gency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

The constitutional questions I have discussed are, in my view, not before us for decision. I mention them, as the Supreme Court said in *Ex parte Endo*, 323 U.S. 283, 299-300 (1944), " . . . not to stir the constitutional issues which have been argued at the bar but to indicate the approach which [I] think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

III.

The President's Inherent Power

The Secretary of State has always treated it as a matter within his own discretion whether he would give a travelling citizen a document surrounding him with the aura of this Government's protection and commending him to other governments. In *Shachtman* we noted the authorities "which have recognized a great breadth of Executive authority and discretion" in this regard.[54] But, we pointed out: "Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport."[55] The question is whether the

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[54] 96 U.S.App.D.C. at 289, 225 F.2d at 940.

[55] 96 U.S.App.D.C. at 290, 225 F.2d at 941.

Executive has power, by withholding a passport, to confine a citizen within the United States. The Constitution grants no such power. But the Secretary purports to find it in "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Numerous cases both before and after *Curtiss-Wright* support the proposition that the President has broad powers in the field of foreign relations. But there is a great gulf between the powers involved in those cases and the power the Secretary claims here. Those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments. What the Court upheld in *Curtiss-Wright* was the President's "power to negotiate with foreign governments."[56] It sustained delegation to the President of the function of declaring an embargo of munitions sales, because the function was to be exercised "after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as [the President] may deem necessary . . . ."[57] The other cases have recognized that it is for the Executive or the Executive with Congress, free from judicial interference, to deal with such matters as recognition of for-

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[56] Mr. Justice Clark concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 661 n. 3. See the authorities collected in *Z & E Assets Realization Corp.* v. *Hull*, 72 App. D.C. 234, 114 F. 2d 464 (1940).

[57] 48 STAT. 811 (1934).

eign governments,[58] assessment of treaty obligations,[59] resolution of disputed sovereignties,[60] acquisition of new lands,[61] exclusion[62] or expulsion[63] of aliens, imposition of emergency controls over alien property,[64] establishment of an international war crimes tribunal,[65] allocation of an international air route,[66] or creation of an international "Mixed Claims Commission."[67] None of the

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[58] *United States* v. *Palmer*, 3 Wheat. 610, 633-34 (1818); *Jones* v. *United States*, 137 U.S. 202 (1890); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *United States* v. *Belmont*, 301 U.S. 324, 330 (1937); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Latvian State Cargo & Passenger S.S. Co.* v. *McGrath*, 88 U.S.App.D.C. 226, 188 F.2d 1000, *cert. denied*, 342 U.S. 816 (1951).

[59] *Ware* v. *Hylton*, 3 Dall. 199, 260 (1796); *Doe* v. *Braden*, 16 How. 635, 657 (1853); *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Ivankevic* v. *Artukovic*, 211 F.2d 565, 573 (9th Cir. 1954).

[60] *Foster* v. *Neilson*, 2 Pet. 253, 307-09 (1829); *Williams* v. *The Suffolk Ins. Co.*, 13 Pet. 414 (1839); *In re Cooper*, 143 U.S. 472 (1892); *The Kodiak*, 53 Fed. 126 (D.Alaska 1892).

[61] *Wilson* v. *Shaw*, 204 U.S. 24 (1907); Mr. Justice Frankfurter, dissenting in *United States* v. *California*, 332 U.S. 19, 45 (1947).

[62] *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950).

[63] *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-90 (1952).

[64] *United States* v. *Von Clemm*, 136 F.2d 968, 970 (2d Cir. 1943).

[65] Mr. Justice Douglas, concurring in *Hirota* v. *Shaughnessy*, 338 U.S. 197, 208 (1949).

[66] *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

[67] *Z & F Assets Realization Corp.* v. *Hull*, 72 App.D.C. 234, 114 F.2d 464 (1940), *affirmed*, 311 U.S. 470 (1941).

"foreign affairs" cases, it has been observed, "involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual." [68] Chief Justice Marshall, describing those Executive powers which are beyond judicial control and citing the foreign affairs power as an example, said: "The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." [69] *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803). A characteristic of the political power which is to be exercised free of judicial interference is its "lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U.S. 433, 454-55 (1939).[70] By this test I think it clear that the

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[68] Comment, 61 YALE L.J. at 187. The *Chicago & Southern Air Lines* case, *supra* note 66, is not an exception. The Court there held that the President's selection of one applicant over another for an international air route was not to be interfered with, because "both as Commander-in-Chief and as the Nation's organ for foreign affairs, [he] has available intelligence services whose reports are not and ought not to be published to the world." 333 U.S. at 111. "The Court evidently was assuming that any secret information the President may have relied upon was in the nature of legislative facts and not adjudicative facts—that the information pertained to international relations and not to qualifications of the particular applicants. . . . Thus an applicant for a license is entitled to a trial type of hearing on issues of fact concerning his qualifications but not necessarily on issues of fact concerning need for the service or conditions in the territory to be served." Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV.L.REV. 193 at 264, 275 (1956).

[69] That the executive power with respect to passports is not of this conclusive character was settled in *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939).

[70] See also the *Chicago & Southern Air Lines* case, *supra* note 66, at 111.

wer the Secretary asserts here is not a political power.[71] The Secretary finds authority to abridge the right to avel in what *Curtiss-Wright* recognized as an inherent ecutive power to 'deal' with "a situation entirely external to the United States, and falling within the category of foreign affairs . . . ." 299 U.S. at 315. Extending to internal affairs the President's inherent power over ternal affairs has dangerous implications.[72] Those im-

[71] "The validity of restrictions on the freedom of movement of particular individuals, both substantively and procedurally, is precisely the sort of matter that is the peculiar domain of the courts." Comment, 61 YALE L. J. at . The Secretary's position that "the issuance and denial passports is within the field of conducting foreign policy" s been described by one commentator as "[a] strange, d to this writer's knowledge, unique position among the untries with democratic and constitutional background." oman, *op.cit. supra* note 17, at 309.

[72] Madison wrote to Jefferson in 1798:

> "The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." Padover, THE COMPLETE MADISON (1953) 257-58.

Mr. Justice Jackson, concurring in *Youngstown Sheet & ube Co. v. Sawyer*, 343 U.S. at 642, declared:

> ". . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

plications have caused some authorities to shrink from the inherent power doctrine as from something "revolutionary and subversive of our constitutional system";[73] or to anticipate from it a carry-over to our national government of all the royal prerogatives which ancient common law associated with the foreign affairs powers of the King of England;[74] or to fear that it "would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State."[75] In our con-

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[73] Patterson, *In re the United States* v. *The Curtiss-Wright Corporation*, 22 TEXAS L.REV. 286 (1944).

[74] Goebel, *Constitutional History and Constitutional Law*, 38 COL.L.REV. 555, 571-72 (1938). In token that his fears are not fanciful, Professor Goebel cites *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-77 (1855), where Mr. Justice Curtis, in upholding the right of the Solicitor of the Treasury Department to proceed by distraint, without judicial process, against the property of a defalcating customs collector, reasoned that the taking was not without due process of law because at common law the Exchequer could use the writ of *extendi facias* to seize the "goods of the King's debtor . . . without requiring any previous inquisition . . . ."

[75] 1 Willoughby, THE CONSTITUTION OF THE UNITED STATES 92 (2d ed. 1929); see also Leviton, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467, 493 (1946). See the concurring opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 641, replying to the Government's argument that the vesting of "The Executive Power" in the President is a grant of all possible executive power: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." One of the evils denounced in the Declaration may have been the King's attempt to prevent emigration to the colonies. Note, 41 GEO.L.J., *supra* note 28, at 70. Even in the earliest co-

plex world there are very few purely internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared that "There is no longer any real distinction between 'domestic' and 'foreign' affairs."[76] If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits heretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress.

But the Supreme Court has confined the inherent foreign affairs power within accountable limits.[77] I am convinced from my review of the authorities and my study of history that the power here claimed by the Secretary is beyond those limits. *Curtiss-Wright* declares that an extra-constitutional foreign relations power passed to the President from the British Crown. To say that *all* the powers of the Crown devolved upon the President would,

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lonial period, Charles I, in the exercise of the royal prerogative to confine the subject to the realm, issued a proclamation against taking passage to America, because some who were going were "'idle and refractory persons' who wished to live out of reach of authority." 10 Holdsworth, HISTORY OF ENGLISH LAW 390 (1938).

[76] OUR FOREIGN POLICY, Department of State Publication 3972, General Foreign Policy Series 26, Sept. 1950, p. 4.

[77] *Supra notes* 58-67. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 487, the Court said, dealing with the analogous question of the extent of the President's military power: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." See also text at notes 95-97, *infra*.

of course, be inconsistent with the basic principle that every branch of the national government has only a limited power, and *Curtiss-Wright* does not even suggest such a thing.[78]

The British Crown had a prerogative to confine subjects to the realm by writs *ne exeat regno*.[79] But it was not one of the prerogatives which devolved upon our President. It had its roots in the Crown's earliest constitutional controversies with the clergy[80] and the barons.[81] By the year 1382, restraints against clerics and notables were relaxed, but a prohibition was placed upon unlicensed departure from the realm by the common subjects of the King. 5 Rich. II, c. 2, §§ 6, 7. In 1607

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[78] A specific royal prerogative, in its devolution upon our national government, may be divided between the executive and legislative branches. See, *e.g.*, 10 OPS. ATT'Y GEN. 452 (1863).

[79] See Note, 41 GEO. L.J. at 64-70.

[80] From the struggles of Henry II with Thomas à Becket emerged, in 1164, the fourth article of the Constitutions of Clarendon prohibiting ecclesiastics from leaving the realm without the king's permission.

[81] John's struggle with the barons culminated, in 1215, in Magna Carta which provided in c. 42:

> "It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as [otherwise] provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy —reserving always the allegiance due to us."

This provision did not survive John. It was omitted from the confirmation of the Charter in 1217 and the definitive proclamation by Henry III in 1225 which is the Charter's present statutory form. *Supra* note 79 at 67-68; Goebel, *op.cit. supra* note 74, at 573-74 n. 51.

that prohibition was repealed, 4 James I, c. 1, so that ostensibly freedom of travel was restored, except to persons covered by special statutes.[82] It is undeniable, however, that the Crown continued to exercise its prerogative to confine subjects to the realm, at least until about one hundred years before our Revolution.[83]

The manner in which British kings employed *ne exeat* was in some ways strikingly similar to our State Department's present policies and practices. The writ, first used "to hinder the clergy from going to Rome . . . ., was afterward extended to laymen machinating and concerting measures against the state . . . . ."[84] At one time the class confined to the realm included "all archers and artificers, lest they should instruct foreigners to rival us in their several trades and manufactures."[85] Bacon says the writs were issuable "in respect of attempts prejudicial to the King and State; (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without cause, or upon such information as his Lordship shall think of weight) . . . ."[86]

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[82] Largely affecting children sought to be sent abroad for Catholic education. *Supra* note 79, at 69.

[83] Goebel, *op.cit. supra* note 74, at 573-74 n. 51; 10 Holdsworth, *op.cit. supra* note 75, at 391-92.

[84] 1 Blackstone, COMMENTARIES (Wendell's ed. 1854) 266 n. 22.

[85] *Id.* at 265-66.

[86] Ordinances, No. 89, quoted in Beames, NE EXEAT REGNO (1st Amer.ed., 1821) 17. In form, the writ commanded the subject "that he go not beyond the seas or out of the realm without a license" upon the stated ground that "we are given to understand that you design to go privately into foreign parts and intend to prosecute there many things prejudicial to us . . . ." Provision was made whereby the subject could apply to Chancery for a license. Parker, *op.cit. supra* note 28, at 867.

The power to confine subjects to the realm, though it had fallen into disuse,[87] was still part of the king's prerogative when we became an independent nation. The draftsmen of our Constitution were familiar with it through Blackstone, "that handbook of the American revolutionary." [88]

Blackstone divided the prerogatives of the Crown into two general categories: those relating to "intercourse with foreign nations"; and those relating to "domestic government and civil polity." 1 COMMENTARIES (Wendell's ed. 1854) 252. It is the first branch of the royal prerogative to which *Curtiss-Wright* refers and upon which the Secretary here relies.

"With regard to foreign concerns," says Blackstone, "the king is the delegate or representative of his people.

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[87] The writ *ne exeat* has continued to be employed only as a private equitable remedy to prevent flight of creditors. *Supra* note 85; Parker, *op.cit. supra* note 28 at 867-68. In its aspect as a private equitable remedy, it was imported into our law. 1 STAT. 334 (1793); JUDICIAL CODE § 261, 36 STAT. 1162 (1911), 28 U.S.C. § 376 (1940); now covered by Rule 64, FED.R.CIV.P., see Notes of Advisory Committee. The royal prerogative still exists in England, but whether it may be exercised in time of peace is doubtful. Note, 41 GEO.L.J. at 70.

[88] Rutland, THE BIRTH OF THE BILL OF RIGHTS 11 (1955). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick* v. *United States*, 195 U.S. 65, 69 (1904). Professor Crosskey refers to the Commentaries as "that great 'best-seller' of the eighteenth century" and points out that some of the members of the Constitutional Convention were on the subscription list of the original American edition in 1772. POLITICS AND THE CONSTITUTION, Vol. 1, p. 411, and Vol. 2, p. 1326, n. 3 (1953).

. . . . In the king, therefore, as in a center, all the rays of his people are united . . . ." [89] *Ibid.* The king's foreign affairs prerogative included the following components: (1) "the sole power of sending embassadors to foreign states, and receiving embassadors at home," *id.* at 252-56; (2) making "treaties, leagues and alliances with foreign states and princes," *id.* at 256; (3) "making war and peace," *id.* at 256-57; (4) issuing "letters of marque and reprisal," *id.* at 257-59; and (5) granting "safe conducts" or "passports" to *aliens* coming to the realm, *id.* at 259-60.[90]

The foreign affairs prerogative *did not include the*

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[89] Cf. John Marshall, in an address to the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONGRESS, 6th Cong., 1st Sess., col. 613 (1800).

[90] The "passports" referred to in this part of the prerogative are merely "safe conducts" which were issued to visiting strangers "under the king's sign-manual," rather than by one of "his embassadors abroad." *Id.* at 259. This part of the foreign affairs prerogative has been carried over to our Government. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950): "The exclusion of aliens is a fundamental act of sovereignty . . . [which] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." See also *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-89 (1952); and *Galvan* v. *Press*, 347 U.S. 522, 530 (1954). The majority's reliance upon *Galvan* to support a power to control the movements of *citizens* is thus misplaced. See text at note 36 *supra*.

So far as the rest of the royal prerogative over foreign affairs is concerned, the power to make war and to issue letters of marque and reprisal were confined by our Constitution to the legislative branch, and the sending of ambassadors to and making of treaties with other nations were given to the President, but with a role preserved for the Senate.

power to confine subjects to the realm. This was p
of the *domestic prerogative*, having to do with *milit*
affairs. Id. at 265. Blackstone says, *id.* at 262:

> The king is considered . . . as the generalissi
> or the first in the military command, within the ki
> dom. The great end of society is to protect
> weakness of individuals by the united strength of
> community; and the principal use of government is
> direct that united strength in the best and most ef
> tual manner, to answer the end proposed. Monarch
> government is allowed to be the fittest of any
> this purpose; it follows, therefore, from the very
> of its institution, that in a monarchy the milit
> power must be trusted in the hands of the prince.

And, "because that every man ought of right to def
the king and his realm, therefore the king, at his pleas
may command him by his writ that he go not beyond
seas, or out of the realm, without license . . . ." *Id.* at
Since the king's *ne exeat* power was part of his dom
tic military prerogative, rather than his foreign affa
prerogative, *Curtiss-Wright* lends no support to a the
that the power devolved upon our President.

It is plain that our Constitution, with respect to thi
military, conveyed to Congress most of the powers wh
were the king's prerogative,[91] leaving the President o
the command function. The President's military pow
said Hamilton, "would amount to nothing more than
supreme command and direction of the military and na
forces, a first General and admiral of the Confedera
while that of the British king extends to the *declaring*
war and to the *raising* and *regulating* of fleets and armi
all of which, by the Constitution under considerati

[91] *E.g.*, "to raise and support Armies," "to provide
maintain a Navy," "to make rules for the government a
regulation of the land and naval forces," the various mil
powers, and the authority to legislate with respect to pla
"for the erection of forts, magazines, arsenals, dock-ya
and other needful buildings." Constitution, Art. I, § 8.

would appertain to the legislature." THE FEDERALIST No. 69 (Ford ed. 1898), p. 460.[92] Since the American citizen does not owe the President such a duty of defens as the British subject owes his monarch, there is no basi for implying a grant to the President of the *ne exea* power which might be necessary to enforce such a duty We owe our duties to the nation, not to its chief execu tive.[93]

The notion that the President possesses inherent *mili tary* power to deal with internal affairs involving private rights was disposed of in *Youngstown Sheet & Tube Co* v. *Sawyer*, 343 U.S. 579 (1952). The Court ruled that i could not, "with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from

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[92] Professor Crosskey points out that St. George Tucker a Jeffersonian, in his 1803 edition of Blackstone, noted that "the student c[ould] not fail to have remarked how many of the most important prerogatives of the British crown [had been] transferred *from the executive authority*, in the United States, *to the supreme national council in Congress.*" *Op.cit. supra* note 88 at 415. Crosskey concludes as to the military prerogative: "So, in this whole field in which the powers of the King were so very great—the field of authority from which, if from any, the Convention may have feared a future American monarchy might conceivably arise —the 'supremacy' of Congress was most carefully and amply provided: apart from the bare 'command' in actual action and administration, all the foregoing authorities of the English King, as 'generalissimo,' were specifically transferred to Congress or subjected, in the plainest terms, to Senatorial or Congressional control." *Id.* at 427.

[93] A cognate of the writ *ne exeat* is the writ available to the king to recall a subject to the realm from abroad. *Supra* note 84 at 266. To the extent that this prerogative power passed to our Government, it is lodged not in the President but in Congress. See *Blackmer* v. *United States*, 284 U.S. 421, 437-38 (1932).

stopping production." *Id.* at 587. Mr. Justice Dougla concurring, declared that "our history and tradition reb at the thought that the grant of military power carrie with it authority over civilian affairs." *Id.* at 632. M Justice Jackson added: "That military powers of th Commander in Chief were not to supersede representa tive government of internal affairs seems obvious fro the Constitution and from elementary American history . . . [The President's] command power is not such a absolute as might be implied from that office in a mil taristic system but is subject to limitations consisten with a constitutional Republic whose law and policy making branch is a representative Congress." *Id.* a 644, 645-66.[94]

At the time of *Youngstown* our Armed Forces wer engaged in active combat in Korea. The record befor the Court contained a number of affidavits by high Gov ernment officials, typical of which was that of the Secre tary of Defense, which stated:

> . . . any curtailment in the production of steel eve for a short period of time will have serious effect on the programs of the Department of Defense whic are essential to national security. A work stoppag in the steel industry will result immediately in seri ous curtailment of production of essential weapon and munitions of all kinds; if permitted to continu it would weaken the defense effort in all critical area and would imperil the safety of our fighting men an that of the nation.

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[94] The executive absolutism implicit in the royal preroga tive has its counterpart in modern systems of governmen which, though formally representative, differ from ours i basic philosophy. Thus, under the Venezuelan theory o "cesarismo democratico," the president is "democracy per sonified, the nation made man" and his "influence and powe . . . extend to all levels of government. . . ." Lott, *Execu tive Power in Venezuela*, 50 THE AMERICAN POLITICAL SCI ENCE REVIEW 422, 425, 440 (1956).

Chief Justice Vinson, dissenting, thought "the uncontroverted affidavits in this record amply support the [President's] finding that 'a work stoppage would immediately jeopardize and imperil our national defense.'" *Id.* at 679. He also cited our numerous international undertakings—United Nations, Korea, Truman Plan, Marshall Plan, North Atlantic Treaty Organization and Mutual Security—all of which might be imperilled if the President's seizure were not upheld. *Id.* at 668-72. He found support for the seizure not only in the President's military power and in his foreign relations power, *id.* at 679, 681, but also in the fact that the emergency required emergency action. *Id.* at 668, 708-19. The Court, however, repudiated these views. It held that the seizure of steel mills involved in labor strife was within Congress' "exclusive constitutional authority . . . in both good and bad times." *Id.* at 588-89.

The military power has in the past been argued to be broad enough to subject to court-martial civilians who obstruct the successful prosecution of hostilities.[95] But, as Professor Edmund M. Morgan pointed out: "Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation."[96] When, during World War I, legislation was offered to subject all spies to court-martial, on the theory that the whole of the United States was a war zone, President Wilson said: "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise."[97]

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[95] Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 103.

[96] Morgan, *Court Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN.L.REV. 79, 106 (1920).

[97] Rankin, WHEN THE CIVIL LAW FAILS (1939) 138-39.

IV.

Conclusion

My conclusions are that (1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U.S.C. § 211a and 8 U.S.C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

The broad power to curtail the movements of citizens of the United States, to the extent that our Government possesses it, *is vested in Congress, not in the President.* Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense. Whether our internal security requires the drastic measure of restricting travel and, if so, to what extent and by what criteria and procedures is for Congress to decide. If and when Congress acts, there will presumably be hearings, reports and debates which may serve to limit what Congress elects to do and may help to interpret what it does. The constitutionality of any such measure will, of course, depend on its provisions and the circumstances in which it is enacted.

The question before us is whether the Secretary of State has power to establish such substantive criteria for travel as are here involved. We need not decide and I do not say that there are no circumstances under which the Secretary may restrain a citizen's travel. Whether

he may deny a passport to prevent a flight from justice[98] or in aid of the enforcement of some specific law, *e.g.*, the Universal Military Training and Service Act,[99] are questions that may arise in other cases. In any event, the exercise of such powers would be a far cry from the Secretary's present undertaking.

EDGERTON, *Chief Judge, dissenting:* We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world. I think the Secretary should be directed to issue a passport.

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by . . . the Constitution." *Williams* v. *Fears*, 179 U.S. 270, 274. We have held that the right to leave the country is an attribute of personal liberty and that restrictions on it "must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law'." *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 290, 225 F. 2d 938, 941.

But we need not and therefore should not[1] decide any constitutional question. As Judge Bazelon's opinion shows, the President and Congress have not undertaken to delegate to the Secretary the authority he claims. This is very clear when the statutes and executive orders on

[98] Cf. 18 U.S.C. § 1073.

[99] Act of June 24, 1948, 62 STAT. 604, 50 U.S.C. App. §§ 451 *et seq.*

[1] *Peters* v. *Hobby*, 349 U.S. 331, 338.

which he relies are construed narrowly. Delegations of authority must be construed narrowly when a narrow construction avoids serious constitutional questions. *United States* v. *Rumely*, 345 U.S. 41.

The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secretary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be "the national interest". If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? Since neither Congress nor the President has undertaken to give the Secretary the authority he claims, we need not consider these constitutional questions.

FAHY, *Circuit Judge, dissenting:* The discretion of the Secretary in issuing passports prior to the enactment in 1941 of 66 Stat. 190, 8 U.S.C. § 1185(b) (1952), see *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 225 F.2d 938, was subject to no clear limitation except that the applicant must qualify as one who owed allegiance to the United States.[1] A passport was in the nature of a political document; one need not have it in order to obtain passage and depart

[1] 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952), which amended 14 Stat. 54 (1866). Under the earlier law only citizens were eligible for passports.

from the United States. So no deprivation of liberty and no justiciable controversy were involved in denial of a passport. But 8 U.S.C. § 1185(b) changed all this. By that statute Congress provided that when the United States is at war or during the existence of any national emergency proclaimed by the President no citizen may lawfully depart from the United States without a valid passport, with exceptions not here pertinent. This was an assertion by Congress of restraint upon travel based upon the war power, coupled with the executive control over passports incident to the conduct of foreign affairs noted in *Shachtman*. The new statute, however, did not enumerate other specific criteria, notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U.S.C. § 1185(b) of more specific criteria renders nugatory the control in question.[2] The statute explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports. Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. Moreover, we do not have here, as in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, an attempted exercise of executive authority alone; the problem is more like that involved in *Hirabayashi* v. *United States*, 320 U.S. 81, where there was a combination of legislative and executive authority. Here Congress seeks to control travel and to that end

[2] It seems manifest that control was attempted. No longer was there to be merely the ascertainment of the obligation or not of allegiance. Before 8 U.S.C. § 1185(b) was enacted this qualification was the sole essential. The enactment, therefore, was a definite authorization by Congress of control of the travel of some who had that qualification.

to enlarge the significance of executive control over passports, in time of war or national emergency. When the Act of Congress is considered with the authority of the executive I think the courts would not be justified in entirely nullifying all control other than that incident to ascertainment by the issuing authority of whether or not the applicant owes allegiance to the United States. I am reassured in this view by the fact that the passport to be issued need be only a simple pass or permit which enables the possessor to depart lawfully from the United States, and no more; and, furthermore, the control is always limited by the requirements of the Due Process Clause. *Shachtman v. Dulles*, *supra*; *Bauer v. Acheson*, 106 F. Supp. 445. Upon these considerations I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. This gives valid content to the Act of Congress, a result to be preferred when reasonably possible, to a holding that Congress has entirely failed in its intended purpose. *Cf. United States v. Rumely*, 345 U.S. 41, and *Ullman v. United States*, 350 U.S. 442.

We come then to the question whether, taking the above approach, the denial of appellant's application is consistent with due process and satisfies the criteria referred to. In reaching this question I construe the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file a statement in accordance with section 51.142 of the Passport Regulations, 22 C.F.R. § 51.142 (Supp. 1957). The denial flows from the regulation and not from an independent conclusion of the Secretary with respect either to appellant or to any particular geographical area. The information sought by the regulation is relevant to the criteria by which the Secretary must be guided; for travel abroad at this time by persons who owe allegiance

to the United States but who are or have been members of the Communist Party may reasonably be deemed to be related to the national defense and to the conduct of foreign affairs. It does not follow, however, that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process. It must be borne in mind that the denial deprives him of liberty to depart from the United States, a right which he has unless lawfully deprived thereof. In *Garner* v. *Los Angeles Board*, 341 U.S. 716, the relevant information which the Court held the applicant must supply was required by law, and was with respect to retaining State employment. These two factual differences are enough I think to distinguish that case from this one. Not only has Congress not specified here that the information refused must be furnished as a condition to obtaining a passport, but the liberty to travel is on a different footing from a desire to retain State employment. In the one case there is the taking away of an existing liberty; in the other there is State control over the qualifications of its employees. And the degree of restraint involved, as well as the nature of the liberty restrained, are pertinent in determining the sufficiency of the reason assigned for the restraint. Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, *cf. Konigsberg* v. *State Bar of California*, 353 U.S. 252, or for other good faith reasons, such as fear of prosecution for making a false statement. Of course the reason may have been that to answer truthfully would have disclosed Communist Party membership and thereby automatically have caused the application to be denied under section 51.135(a) of the Regulations. But we are not required to assume this reason, or now to decide the validity of denial of a passport based on such assumption. It is true, as pointed out in Judge Washington's concurring opinion,

that Congress has declared that travel of Communist members facilitates communication and is a prerequisite for carrying on of activities to further the purposes of the Communist movement. The Secretary cannot be required to assume that a real Communist Party member who is a citizen of or otherwise owes allegiance to the United States, can be relied upon to adhere to his obligation of citizenship when it conflicts with the responsibility he has assumed by Party membership. For this reason a general uncertainly as to the conduct of those involved in Communist membership or discipline has a justifiable place in considering passports. But such general uncertainty is not a substitute for a decision by the issuing authority where, in any event, Party membership or discipline is not shown. An applicant who refuses to file the statement required by section 51.142 may have no derogatory information to supply, or he may need to depart for personal or other reasons unrelated to some possible Communist involvement. Yet the Secretary, though satisfied to either effect, could not permit the departure. Thus to create a general restriction on travel by those who refuse the information, without more, is not reasonable. It prohibits travel by an individual whose own reason to depart does not come within the criteria upon the basis of which the Secretary may validly refuse him permission to depart. The intended travel might be wholly unrelated to any problem of national defense or foreign affairs. To avoid this difficulty a conclusion should be reached by the issuing authority in the individual case, or with respect to the territorial area involved, on the question whether the travel would be reasonably likely to be detrimental to the national defense or to the conduct of our foreign affairs. While the issuing authority may take into consideration the refusal of the applicant to comply with section 51.142, due process is not afforded in peacetime by applying to an individual case the general restriction referred to when there is op-

portunity for a particular judgment. The exigencies of the situation do not require a blanket rule which, for administrative convenience or otherwise, obviates the necessity of a judgment reached by the issuing authority in the individual case. We are not at war. There is a presidentially proclaimed period of national emergency, but we must not construe the authority to be exercised as equal to that available in wartime. To bring the regulation of travel within the requirements of substantive due process, *Shachtman* v. *Dulles*, *supra*, calls I think for the exercise by the issuing authority of its own decisional processes to a greater degree than inheres in denial of a passport through the self-executing effect of an applicant's refusal to supply the information sought by section 51.142 of the Regulations.

Being of the views thus expressed I would reverse and remand, with direction that the case be returned by the District Court to the Secretary for reconsideration consistently with these views and with procedures required by our decision in *Boudin* v. *Dulles*, 98 U.S. App. D.C. 305, 235 F.2d 532.

[fol. 247] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C.A. 5042-55

No. 13,317

WALTER BRIEHL, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT—June 27, 1957

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

Per Curiam.

Circuit Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Circuit Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary.

Circuit Judge Burger took no part in the consideration or decision of this case.

Circuit Judge Prettyman filed an opinion in which Circuit Judges Wilbur K. Miller, Danaher and Bastian concur.

Circuit Judge Washington filed an opinion concurring in the result.

Circuit Judge Bazelon filed a dissenting opinion in which Chief Judge Edgerton concurs.

Chief Judge Edgerton also filed a separate dissenting opinion.

Circuit Judge Fahy filed a dissenting opinion.

[fol. 251] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 253] SUPREME COURT OF THE UNITED STATES
No. 481, October Term, 1957

ROCKWELL KENT and WALTER BRIEHL, Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State

ORDER ALLOWING CERTIORARI—November 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.